(1)

No. 92-7507-CSY
Status: DECIDED
CAPITAL CASE

Title: Everett Lee Mueller, Petitioner
v.
Virginia

Docketed:
February 3, 1993

Court: Supreme Court of Virginia

Counsel for petitioner: Mueller,Everett Lee

Counsel for respondent: Terry,Mary Sue

Entry	Date	Note	Proceedings and Orders
1	Feb 3 1993	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 8 1993		Brief of respondent Virginia in opposition filed.
4	Mar 11 1993		DISTRIBUTED. March 26, 1993
6	Mar 29 1993		REDISTRIBUTED. April 2, 1993
8	Apr 12 1993		REDISTRIBUTED. April 16, 1993
10	Apr 19 1993		Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun and Justice Souter join. (Detached opinion.)

****

92-7507

No. _____

Supreme Court, U.S.
FILED
FEB 3 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

EVERETT LEE MUELLER, pro se,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ORIGINAL

WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRIGNIA

PETITION FOR WRIT OF CERTIORARI

Everett Lee Mueller, pro se
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QUESTIONS PRESENTED FOR REVIEW

1. Were Mueller's Fifth Amendment rights violated when the interrogaton was not terminated after he repeatedly asked to be taken to Jail?

2. Should the police be allowed to violate the Miranda warnings earlier given to the defendant by later telling him he didn't need a lawyer?

3. Was it improper for the Court to limit the defendant's proposed voir dire of jurors regarding the death penalty?

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IN THE SUPREME COURT OF THE UNITED STATES

EVERETT LEE MUELLER, pro se,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRIGNIA

The Petitioner, Everett Lee Mueller, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

OPINION BELOW

The opinion of the Supreme Court of Virginia in this case was rendered September 18, 1992, cited as Everett Lee Mueller v. Commonwealth, Record #920287 (VA September 18, 1992).

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Virginia on September 18, 1992 and a denial of the Petition for a Rehearing on November 6, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the law.

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The Defendant was convicted in Chesterfield Circuit Court, before the Honorable William R. Shelton with a jury, on September 12, 1991, of rape and was sentenced to life in prison; of abduction and was sentenced to life in prison; and of capital murder and was sentenced to death.

The capital conviction was appealed as a matter of right to the Supreme Court of Virginia and was consolidated with the non-capital convictions for review by said court.

On September 18, 1992, the Supreme Court of Virginia found no error in the issues raised and the judgments were affirmed. Subsequently, said court on petition to set aside the judgment and grant a rehearing, said petition was denied November 6, 1992.

STATEMENT OF FACTS

THE CRIME

On October 6, 1990, a ten year old girl named Charity Powers went to a skating rink in Chesterfield County close to the intersection of Routes 1 and 10. She was last seen alive at a Hardees on Route 1 late on the evening of October 6, 1990. The evidence showed that the arrangements Charity Powers' mother made to have her picked up after skating failed. The publicity regarding her disappearance was both widespread and intense.

Within days of her disappearance, the investigative team had focused on Everett Lee Mueller, the defendant herein, as a prime suspect. The principal investigators involved were Investigator Wayne Garber of the Chesterfield County Police and Special Agent Jack Palfi of the Federal Bureau of Investigation. They were supervised and assisted in part by Sergeant Mike Spraker of the Chesterfield County Police. Within days of her October 6 disappearance, Garber and Palfi made their first contact with Mr. Mueller. At various times they interviewed Mueller at his home, at his job, and at the Chesterfield Police Station. Throughout these interviews he consistently denied any involvement in the disappearance of Charity Powers. In mid February of 1991, the investigating officers received further information regarding the possible whereabouts of the body. A further search of a wooded area just off of Route 1 and close to the area of Mueller's house revealed what later turned out to be the body of Charity Powers. Her body was removed form the shallow grave close to a pond and taken to the medical examiner's office in Richmond.

THE CONFESSION

On February 21, 1991, Investigator Garber and Agent Palfi, accompanied by numerous other law enforcement officers, arrested Mueller as he left his house that morning. Mueller was advised of his rights and taken to a small interrogation room at the Chesterfield Police Station and a three to four hour interrogation was begun. This interrogation was video-taped. The video tape of the interrogation and subsequent

statement by the defendant was analyzed by an independent expert at the request of the defendant. A review of the video tape of that interrogation will show that Mueller was seated at a table in a small room; across the table was agent Palfi; and between the two and facing the table was investigator Garber. Garber was seated with his back to the video camera and the camera was posed so that Mueller's right side was exposed and Plafi's left side was exposed. Throughout the three to four hour interrogation Mueller made repeated requests that he be carried to the jail. (App.181). After several hours of the interrogation, with Mueller's repeated requests to be carried to the jail being denied, Palfi left the room, stating that he was fed up with Mueller's attitude and his refusal to accept their help.

It should be noted that both agent Palfi and Investigator Garber testified at the suppression hearing that they interpreted the defendant's requests to be taken to jail was a way to avoid further questioning, but neither ever asked Mueller specifically if he wanted to end the interrogation. While Palfi was out of the interrogation room, Garber continued his insistent requests for Mueller to help himself. Garber and Palfi but especially Garber, consistently stated to Mueller that he knew he wasn't the kind of person who would do something like this to a young girl and that it must have been an accident. They also repeatedly advised Mueller that they believed there were two Muellers, the one who was "drinking" and the one who was not "drinking", with the "drinking" Mueller being the bad

one.

While Palfi was out of the room Mueller looked at Garber and said, "Do you think I need a lawyer here?" (pp. 179). The video tape shows that Garber shook his head in the negative while speaking the words, "We're just talking here." At that time, Mueller asked Garber to get agent Palfi back in the room and thereupon advised both of them that they had the right guy. A detailed admission followed.

Later on that day Mueller accompanied the police to the scene of the grave and proceeded to point out specific items of evidence to the police. This activity was video taped by the police. The exhumation and removal of Powers from the grave site was video taped at another time.

Mueller's confession and his activities at the subsequent inspection of the grave area were instrumental in his convictions. There were no eye witnesses that specifically placed Mueller at the Hardees where Powers was last seen alive. There was no forensic evidence, such as finger prints or DNA or otherwise, to link Mueller to Powers. There were no eye witnesses to any of the offenses.

In his statement to the officers, Mueller admitted that the had picked up Powers at the Hardees, that he had driven her to his house, that they had walked into the woods and had intercourse, and that he must have strangled her. The autopsy of Powers revealed that there had been an injury to her neck. During the guilt portion of the trial Dr. Marcella Fierro, who testified on behalf of the Commonwealth, indicated that the

cause of death was acute neck injury.

Through another witness the Commonwealth introduced a knife that had been found in the general vicinity of the grave. Mueller admitted having been aware of the existence of the knife but denied having used it with Powers. During the penalty phase of the trial, Dr. Fierro was allowed to testify over the defendant's objection that in her opinion that knife had been used by Mueller to cut Powers's throat and this was the cause of death. On cross examination, she admitted that her opinion was not to a reasonable decree of medical certainty. The Commonwealth conceded that Fierro's statements were feelings she had, but that they created a factual issue for the jury to decide.

PRETRIAL MATTERS

The defendant made a motion in limine prior to trial in which he proffered to the Court that he had been convicted of rape on two prior occasions and that a conviction of rape in the Powers case would be his third such conviction. The motion in limine relied upon the law of Virginia that makes a defendant with a third rape conviction ineligible for parole. The defendant asserted that, in the penalty phase at least, the jury should know that with a third conviction for rape, the defendant would not be eligible for parole on any like sentence or term of years they might impose. The motion in limine was denied by the Court after argument.

The defendant made pretrial motions and presented argument regarding the constitutionality of the death penalty

and the leness predicate of the eath penalty. The Court overruled each of those motions.

Additionally, the defendant moved for a change of venue because of the widespread publicity regarding the Powers case. During the voir dire of prospective jurors, various members of the venire admitted to the court that they had heard and read the publicity and , as a result, knew that the defendant had previously been convicted of rape, and also had confessed to the crime. The defendant moved that each of those potential jurors be stricken for cause. The court overruled the defendant's motion.

The defendant also moved to suppress his statements to the police but the Court denied the motion.

THE TRIAL

A motion for mistrial was made by the defendant after Kevin Speaks' testimony. (App. 1010, 1097 and 1169). The basis for the motion was that the Commonwealth had withheld exculpatory evidence in spite of the defendant's timely filed Brady motion.

THE PENALTY PHASE

During the penalty phase of the trial, Carol Mueller was called by the Commonwealth and testified that the defendant had raped her in 1977. (App. 1205). She stated that she was the sister of the defendant and that she knew he had become eligible for and had made parole on the twenty year sentence he received for raping her after he had served only some five years. Judith Corbin was called by the Commonwealth in her role as Custodian of Records of the Department of Corrections.

She confirmed to the jury that Mueller had made mandatory parole from the 1977 rape conviction of Carol Mueller. (App. 1240).

During the penalty phase of the trial the defendant testified in his own behalf. His direct examination did not touch at all on the Powers offenses but instead focused primarily on his up-bringing as well as the sentence he had served for the rape of Carol Mueller Bowers. He talked about his family life and the difficulties he experienced with his schooling.

THE SENTENCING

At the hearing on November 26, 1990, when the presentence report was presented to the court, the defendant again argued the issue of parole eligibility and offered to present the testimony of the jury foreman that the jury had discussed parole during its deliberation. The Court would not allow the testimony but did accept the foreman's affidavit. The Court then imposed the sentences recommended by the jury.

REASONS FOR ALLOWING THE WRIT

I. THE COURT INCORRECTLY ALLOWED INTO EVIDENCE STATEMENTS MADE BY THE DEFENDANT AFTER HE ATTEMPTED TO END HIS INTERROGATION BY POLICE.

According to Miranda v. Arizona, 384 U.S. 436 (1966), a confession must be voluntary, and an individual is always free to exercise his right to remain silent. If he gives any indication prior to or during an interrogation that he wishes to remain silent, the interrogation must cease immediately,. Id; See R. Bacigal, **Virginia Criminal Procedure**, Section 7-3 (2d ed. 1989). Whether a confession is voluntary is determined in light of the totality of the circumstances, and whether the suspect's will "has been overborne and his capacity of self-determination critically impaired." Terrell v. Commonwealth, 12 Va. App. 285, 290 (1991) (citing Rodgers v. Commonwealth, 227 Va. 605 (1984); Stockton v. Commonwealth, 227 Va. 124 (1984)).

Along with the details of the interrogation, the personal characteristics of the accused must be considered in the totality of the circumstances. Terrell, Supra at 290-91. This includes the accused's intelligence, education, prior education, prior experience with the police, emotional or mental disability, and the deprivation of physical comforts. Id. at 291 (citing R. Bacigal, **Virginia Criminal Procedure**, Section 7-2 (2d ed. 1989)).

In the present case, Mueller gave a confession after he had repeatedly asked to be taken to jail. Although Mueller

has had prior experience with the police, he only has an eighth grade education. By asking to be taken to jail, Mueller was clearly asking to terminate the interrogation. At this point the questioning should have stopped.

When his request was denied, and questions continued, he began about his right to counsel. After he was denied counsel, Mueller did what he felt he had no other choice but to do. He confessed. This type of coerced confession, however, is exactly the type of situation that Miranda seeks to prevent. Otherwise, the police would always be fee to prod confessions out of suspects merely by denying basic requests.

When the police denied Mueller's request to be taken back to his cell, they directly violated his right to remain silent and his right to terminate the interrogation at any time.

II. THE COURT INCORRECTLY ALLOWED INTO EVIDENCE STATEMENTS MADE BY THE DEFENDANT AFTER ONE OF THE POLICE INTERROGATORS TOLD THE DEFENDANT THAT HE DID NOT NEED AN ATTORNEY.

The police must stop any questioning when a defendant invokes his sixth amendment right to counsel, and the questioning may not be resumed until counsel is present or the suspect re-initiates dialogue. Edwards v. Arizona, 451 U.S. 477 (1981). The question then is, what is considered a request for counsel? Virginia has established a "Bright Line" test in which "a request for counsel must be 'unambiguous and unequivocal' in order to trigger the Edwards rule." Eaton v. Commonwealth, 240 Va. 236, cert. denied, 112 S.Ct. 88, reh'g. denied, 112 S. Ct. 623 (1990).

Defendant's request here is more than merely a request for counsel. It goes back to the basic warnings given in Miranda. Once Garber responds in the negative, he undercuts the earlier warnings and vitiates them.

In Eaton, the police interrogated the defendant. During the questioning, Eaton asked, "Maybe I ought to talk to a lawyer," "Didn't you say I had a right to a lawyer," and "I need to talk to someone, a lawyer, a psychiatrist, someone." Id. at 447. The detective questioning Eaton remained silent. The interrogation continued, and Eaton's statements were used against him at trial. Id. Since Eaton did not expressly state that he wanted counsel present, he did not meet the "bright line" test, and his statements were admissible. Id. at 435..

Like Eaton's first statement, Mueller also made a statement contemplating the need for a lawyer but, specifically in the form of a clear question: "Do you think I need a lawyer here?". Mueller, however, did not continue with subsequent equivocating statements like Eaton's. Eaton's second statement was more of a question to clarify his rights. Mueller made no such ambiguous statement and, most important of all, Investigation Garber did not simply remain silent in response to Mueller's question. Instead, Investigator Garber clearly responded that Mueller did not need an attorney, thereby undermining the earlier Miranda warnings.

> In my opinion, when equivocal statements such as these are made, the most obvious and appropriate response is to ask the suspect, "Do you want a lawyer?". The suspect's response

> ...o this question should resolve the ambiguity and allow the interrogators to proceed accordingly. This test is easy to apply, consistent with Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny, and efficient in terms of police and court time. It provides a true bright-line rule which is fair to defendants and police alike.

Id. at 448 (Lacy, J., dissenting) (footnotes omitted).

The bright-line test in Eaton gets its foundation from two cases: Poyner v. Commonwealth, 229 Va. 401, cert. denied, 474 U.S. 888 (1985), and Bunch v. Commonwealth, 225 Va. 423, cert. denied, 464 U.S. 977 (1983).

In Poyner, the defendant asked during an interrogation, "Didn't you say I have the right to counsel?" Poyner, supra at 410. The Officers said "yes," and they began to stand up. Id. at that point, Poyner spontaneously said, "Let me tell you about the car." Id. The Court decided that Poyner question only sought a clarification of his rights; he was not asking for counsel. Id. furthermore, Poyner obviously was not demanding counsel because he re-initiated the conversation. Id. at 411.

The present case is vastly different from Poyner. During Mueller's questioning, Mueller asked the police, "Do you think I need a lawyer here?" The police responded, "No, we're just talking here." Unlike Poyner's question, Mueller's question was not an attempt to clarify his rights. Instead, Mueller's statement showed that he was consciously considering invoking his right to counsel. When the policeman said that Mueller did not need one, the policeman made an affirmative attempt to deter Mueller from exercising his right to counsel.

Poyner voluntarily confessed after he was given an opportunity to consider his options. Mueller, however, was denied the option due to zealous police efforts to obtain a confession.

In Bunch v. Commonwealth, 229 Va 423, 430, cert. denied, 464 U.S. 977 (1983), the defendant mentioned during the interrogation that he might want an attorney, When Bunch said this, the interrogation stopped. Id. The defendant then voluntarily made a statement that he would cooperate, and he signed a written waiver of counsel. Id. at 430-31.

Bunch, like Mueller, showed that he was contemplating a request for counsel. At bunch's trial, the court considered this to be an adequate request for counsel. Id. at 430. but where the police remained silent in Bunch, They actively convinced Mueller not to ask for counsel. Also, after allowing Bunch to make up his own mind to cooperate, the police had Bunch sign a written waiver of counsel. Mueller, on the other hand, was continuously asked questions, so he did not re-initiate the questioning.

In short, but for the investigator's statement to dissuade the defendant from asking for counsel, Mueller may have given an "unambiguous and unequivocal" request for counsel. Second, the actual effect of the policeman's statement was to diminish the importance of Miranda warnings. Mueller was given his warnings, and when he considered exercising his rights, he was told by the police that an attorney was not necessary because "they were just talking." Thus, we do not even reach

the bri[illegible]-line test set forth in [illegible]ton, because Mueller was informed that his right against self-incrimination was not in jeopardy. This type of police conduct is clearly more egregious than the conduct in Eaton and cannot be condoned in light of the Fifth and Sixth Amendments.

The police could have remained silent when Mueller asked his question. They could have even reaffirmed his right to counsel by rereading his Miranda warnings. They also could have simply asked Mueller if he wanted an attorney. But to advise a defendant of his rights, and then tell him that a formal interrogation is not important enough to have counsel present is both offensive and shocking to the conscious. Allowing this type of police action would effectively uproot the fundamental principles of justice and fair play which is at the cornerstone of our judicial system's aversion to police coercion. The police simply cannot inform a suspect of his rights, and then actively encourage a waiver of those right.

III. THE COURT IMPROPERLY LIMITED THE DEFENDANT'S PROPOSED VOIR DIRE OF JURORS.

In Virginia, we operate from the general premise that a juror may not be challenged for cause on his views about capital punishment unless those views would prevent, or substantially impair the performance of his(her) duties as a juror, LeVasseur v. Commonwealth, 225 Va. 564 (1983); Coppola v. Commonwealth, 220 Va. 243 (1979). The Commonwealth has carved out a secure, safe and effective question -- Do you have any

IN THE SUPREME COURT OF THE UNITED STATES

EVERETT LEE MUELLER, pro se,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 1993, a true copy of the foregoing Motion for Leaving to Proceed in Forma Pauperis, and Affidavit in Support of Motion to Proceed on Writ of Certiorari in Forma Pauperis, and Petition for Writ of Certiorari to the Supreme Court of Virginia, all of which are being filled pro se, were mailed to the Honorable Clerk of the Supreme Court of the United States, One First Street, Northeast, Washington, DC 20543, and to the Honorable Attorney General of Virginia, 101 North Eighth Street, Richmond, Virginia 23219, by depositing such documents in a United States Post Office, postage prepaid.

E. L. Mueller

EVERETT LEE MUELLER, pro se

religious or moral objections to death penalty? If the answer is yes, the predictable result is that the juror is stricken. the defense has, historically, not had such an easy and effective method of determining which jurors would not consider life imprisonment as an option in any given case. The rulings in Patterson v. Commonwealth, 222 Va. 653 (1981) give us some guidance as to what the state of the law is in Virginia. In that case the court ruled that the question, "Do you believe that the death penalty is ordinarily the proper punishment for the crime of capital murder?" was too vague, argumentative and non-specific. The court, on the other hand, said that it was proper to use, ". . . and if the jury should happen to convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?"

The key, of course, to qualification of a juror is not opposition to death penalties or propensity towards the death penalty, but whether or not the juror could consider other options, Witherspoon v. Illinois, 391 U.S. 510 (1968). In trying to determine what a juror would "consider" it is apparently permissible for the Commonwealth to ask if anything would prohibit a juror from imposing death while the defendant is not allowed the latitude to determine if something would prohibit a juror from giving a life sentence. This clear inequity certainly cannot be intentional.

The situation for the defendant is made worse when the trial court not only refuses to allow the defense to ask

pointed questions to determine whether or not a juror is death prone, but goes further and asks, or allows the Commonwealth to ask, questions to which the "proper" answer is obviously one which leads the juror to express that he(she) is not prejudiced. In Foley v. Commonwealth, 8 Va. App. 149 (1989), the court reversed the defendant's conviction due to such voir dire. Consider, in the instant case, the voir dire of potential juror Zoeckler (App. 518-542). The Court asked a series of questions designed to elicit "proper" answers. The Commonwealth then followed with a series of statements designed to box the juror in, and then asked if the juror would consider both penalties. When the juror responded "I think so, yes" (App. 524) the Commonwealth followed with this statement: "In other words, you would not automatically, if you found him guilty, vote to impose the death penalty, but you would wait and listen and hear the evidence and decide what would be the appropriate punishment."

What juror would say "No, I won't listen to the evidence." or "No., I won't decide on an appropriate punishment."? Of course, the juror responds, "yes."

Under more direct questions, however, we can glean the true feelings of the juror, if allowed. Unfortunately, counsel was not allowed to ask specific questions in all instances with his juror. For example, the question " . . . if in sitting in the guilt phase of this trial you conclude beyond a reasonable doubt that Mueller has raped and killed

a 10 year old child, don't you think that death is the only appropriate punishment for that?" (App. 529). The question was not allowed. When counsel, after bench conference, added to the question ". . . and then you sit in the sentencing phase and listen to the evidence in aggravation and the evidence in mitigation, aren't you going to think the only appropriate sentence is death?" The court again sustained objection to the question. The court instructed counsel that he could only ask if the juror would consider both possible penalties (App. 535). That is, of course, the ultimate question for the court to determine, but the court erred in not allowing counsel to ask any questions to establish the jurors' ability or intent to "consider" both penalties. The limited leeway that the court gave the defense counsel in the Zoeckler voir dire established that he was death prone, and that the defendant would bear the burden to mitigate his actions in order to receive a life sentence (App. 538). The court then permitted the Commonwealth to lend the juror back to the neutral fold, and the juror was deemed qualified to sit.

Similar questions by the defense were asked to prospective juror Gryder and the Commonwealth's objection was sustained (App. 708, 709).

Interestingly, when juror Hutchins did not give "proper" responses, the court asked the question that the defense wanted to ask all jurors, essentially, if you found Mueller guilty of capital murder would you only vote for death? (App.

810). This is, in fact, a proper question. It is the only and the obvious counter to "Do you have any objection to the death penalty" and the court should have allowed defense counsel to ask it to the appropriate prospective jurors.

The court's refusal to allow the defense to voir dire prospective jurors improperly deprived the defendant of a fair and impartial jury, and was in violation of his 6th and 14th Amendment rights.

CONCLUSION

For the reasons stated above, the petitioner, Everett Lee Mueller, respectfully requests this Court issue a writ of certiorari to the Supreme Court of Virginia to review the constitutionality of his conviction and sentence.

Respectfully submitted,

Everett Lee Mueller

EVERETT LEE MUELLER, pro se
#190275
Mecklenburg Correctional Center
Post Office Box 500
Boydton, Virginia 23917

Attorney Pro Se

Subscribed and sworn to before me this 1st day of February, 1993.

Notary Public

My commission expires: 10-31-94.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 6th *day of* November, 1992.

Everett Lee Mueller, Appellant,

against Record Nos. 920287 and 920449
Circuit Court Nos. CR91F00485,
CR91F0048-01 and -02

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 18th day of September, 1992 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 18th *day of* September, 1992.

Everett Lee Mueller, Appellant,

against Record No. 920287
Circuit Court No. CR91F00485

Commonwealth of Virginia, Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Chesterfield County on the 19th day of December, 1991.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

It is ordered that the said circuit court allow counsel for the appellant a fee of $1,550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

EVERETT LEE MUELLER

v.

COMMONWEALTH OF VIRGINIA

Record Nos. 920287 and 920449

September 18, 1992

Present: All the Justices

In the automatic review of a death sentence, consolidated with the appeal of the capital murder conviction of the defendant as well as with the appeal of the non-capital convictions, no error is found and the sentences and convictions are upheld.

Criminal Law — Capital Murder — Rape and Abduction — Constitutional Law — Criminal Procedure — *Miranda* Warnings — Confessions — Jury Selection — Change of Venue

A ten year old child disappeared and four months later her body was recovered from near the defendant's home. He was arrested and confessed to raping and murdering the child. At the first stage of a bifurcated trial, a jury found the defendant guilty of capital murder during the commission of rape and abduction. The jury also found him guilty of rape and abduction with intent to defile. It fixed his punishment at life imprisonment on each of these charges. In the penalty phase of the capital murder trial, the jury fixed the defendant's punishment for capital murder at death, based on findings of both vileness and future dangerousness. At the hearing required by Code § 19.2-264.5, the trial court imposed the sentences fixed by the jury. The defendant appeals.

1. Legal issues raised by the defendant which are resolved by previous decisions are not discussed beyond representative citations to cases in which those issues were decided adversely to the defendant's claims. The previous rejections of the contentions are affirmed.

2. Although the defendant assigned error to certain issues, he did not address them in his brief and, pursuant to Rule 5:27(e), he has waived any objection to these rulings and the issues will not be considered on appeal.

3. Whether a statement is voluntary under the *Miranda* standard is ultimately a legal rather than a factual question, but subsidiary factual questions are entitled to a presumption of correctness.

4. The test to be applied in determining voluntariness is whether the statement is the product of an essentially free and unconstrained choice by its maker or whether the maker's will has been overborne and his capacity for self-determination critically impaired, given the totality of all the surrounding circumstances.

5. The factual findings of the trial court that the defendant knew how to ask for the assistance of counsel, that his question to one of the detectives was not an expression of a desire to have the assistance of counsel, and that the police properly advised the defendant of his *Miranda* rights and he understood those rights prior to confessing to the crimes are supported by the record and are accorded substantial weight in the determination that the defendant's statement was voluntary.

6. Based on a review of the videotape of the defendant's interrogation, his statements regarding going to jail were simply impatient gestures and they did not constitute an invocation of his right to terminate the interrogation.

7. The defendant's question to the officer, "Do you think I need an attorney here?" did not constitute an unambiguous request for counsel.

8. Under the totality of the circumstances in this case, the detective's response to the question did not invalidate the defendant's earlier waiver of his *Miranda* rights.

9. As a matter of law, the defendant's confession to the detectives was voluntary.

10. There is a presumption that a defendant can receive a fair trial from the citizens of the jurisdiction in which the offense occurred and it is the burden of the defendant to overcome this presumption by demonstrating that the feeling of prejudice on the part of the citizenry is widespread and is such that would be reasonably certain to prevent a fair trial.

11. The decision whether to grant a change of venue lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless the record affirmatively shows an abuse of discretion.

12. Here there was no challenge to the accuracy of the media coverage of the case, nor was it unduly difficult to select a jury because of a predisposition toward a belief in the defendant's guilt. The trial court did not abuse its discretion in denying the defendant's motion for a change of venue.

13. Since the defendant did not proffer any questions regarding the ability of a prospective juror to impose a life sentence, he may not claim on appeal that his right to question this prospective juror was violated.

14. The trial court did not err in sustaining the prosecutor's objection to two questions which were argumentative and provided the prospective juror with no basis upon which to express an opinion, and even ignoring the argumentative nature of the questions, the trial court's ruling did not violate the defendant's right to a fair and impartial jury.

15. The trial court did ask questions which probed whether a prospective juror would automatically vote for the death penalty and he responded that he would not vote automatically to impose either the death penalty or life imprisonment. The trial court did not abuse its discretion in refusing to allow further questions proposed by the defendant on that subject.

16. Since the defendant cites no evidence to support his contention that the venire was tainted by the comments of one prospective juror and the record reflects

that both counsel had ample opportunity to question each prospective juror and the questioning revealed no evidence that the comments had influenced the prospective jurors in any way, the trial court did not abuse its discretion in refusing to disqualify the entire venire because of those comments.

17. In reviewing the rulings of the trial court on challenges for cause, the voir dire is considered as a whole to determine whether there is any indication that a juror's performance of his or her duty in accordance with the trial court's instructions and the oath. The jurors need not be totally unaware of the facts and issues involved in the case.

18. In a review of the voir dire testimony of each of nine prospective jurors, there is no indication that each could not lay aside his or her impressions or opinions and render a verdict based on the evidence presented in court and therefore there was no manifest error in the trial court's refusal to strike any one of those jurors for cause.

19. Since the record does not reveal whether the defendant's photograph was included in a photo array, and the witness did not identify any photograph shown to him by the police as representing the man he had seen near the victim, the trial court correctly determined that the information did not constitute exculpatory evidence and the defendant was not entitled to a mistrial based upon the prosecutor's failure to inform him of exculpatory evidence within the meaning of *Brady*.

20. The trial court did not err in its rulings which did not allow the defendant an opportunity to introduce evidence regarding parole ineligibility in mitigation of punishment at the penalty phase of the trial because it has been uniformly and repeatedly held that information regarding parole eligibility is not relevant for the jury's consideration.

21. Evidence of a defendant's prior parole history is admissible during the penalty phase of a capital murder trial where the Commonwealth is seeking the death penalty based on the "future dangerousness" predicate.

22. After a defendant has testified as to certain matters, the proper scope of cross examination lies within the sound discretion of the trial court. Here, the trial court did not abuse its discretion in allowing the Commonwealth to question the defendant about his prior convictions for sexual offenses, as well as about whether he had learned anything as a result of his commission of the present offenses.

23. Where the defendant did not object at the time that the medical examiner had not stated her opinions with a reasonable degree of medical certainty, he may not complain on appeal regarding the admission of this opinion evidence.

24. Since the medical examiner gave testimony at the penalty phase of the trial which involved only a description of the condition of the victim's body, based on photographs being offered, it did not constitute opinion evidence, and it was properly admitted.

25. Here the testimony sufficiently established the defendant's aggravated battery of the victim, as well as his depravity of mind, to meet the vileness predicate set forth in Code § 19.2-264.2.

26. The evidence of the medical examiner is sufficient to establish an aggravated battery because the victim was subjected to an interval of agony awaiting death.

27. The conduct of the defendant toward the victim extended over a period of time and under such circumstances as permits an inference of psychological torture.

28. Evidence of sexual mutilation, whether occurring before or after death, evinces a depravity of mind within the meaning of Code § 19.2-264.2.

29. The sentencing form, in conjunction with Instruction A, fully apprised the jury of its sentencing options, and did not favor any of the options presented.

30. After a review of prior cases in which capital punishment was imposed, as well as cases in which life imprisonment was imposed, it is concluded that the sentence of death in this case was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of a similar nature.

31. Nothing suggests that the defendant's death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor.

Appeals from judgments of the Circuit Court of Chesterfield County. Hon. William R. Shelton, judge presiding.

Affirmed.

Cary B. Bowen; Christopher J. Collins (Bowen and Bowen, on brief), for appellant.

Robert H. Anderson, III, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

JUSTICE KEENAN delivered the opinion of the Court.

Charity Powers, age ten, disappeared in the early morning hours of October 6, 1990. Four months later, her body was recovered from a shallow grave near the home of Everett Lee Mueller. Mueller was arrested and thereafter confessed to her rape and murder.

At the first stage of a bifurcated trial, conducted pursuant to Code §§ 19.2-264.3 and -264.4, a jury found Mueller guilty of capital murder in violation of Code § 18.2-31(5) and -31(8) (murder in the commission of a rape, and murder of a child under 12 in the commission of an abduction). The jury also convicted Mueller of rape

and abduction with intent to defile, and it fixed his punishment at life imprisonment on each of those charges. In the penalty phase of the capital murder trial, the jury fixed Mueller's punishment for capital murder at death, based on findings of both vileness and future dangerousness. After the hearing required by Code § 19.2-264.5, the trial court imposed the sentences fixed by the jury.

Mueller is before this Court for automatic review of his death sentence and, pursuant to Code § 17-110.1, we have consolidated that review with his appeal of his capital murder conviction. We have also certified from the Court of Appeals Mueller's appeal of his noncapital convictions. Code § 17-116.06. Further, in accordance with Code § 17-110.2, we have given this matter priority on our docket. We review the evidence and all reasonable inferences fairly deducible therefrom in the light most favorable to the Commonwealth, the prevailing party below. *Cheng* v. *Commonwealth*, 240 Va. 26, 42, 393 S.E.2d 599, 608 (1990).

I.

THE EVIDENCE

The evidence at trial showed that on the evening of October 5, 1990, Taryn Potts took her daughter, Charity Powers, to a skating rink and left her there for the evening. Potts had arranged to have a friend, Steve Harris, drive Charity home from the rink later that night. However, Harris fell asleep and he did not go to the rink. When Potts arrived home at 3:00 a.m. on October 6, 1990 and discovered that Harris had not brought Charity home, she immediately contacted the police, and they began to look for her daughter.

Kevin H. Speeks, who knew Charity, testified that he saw her at a fast food restaurant near the skating rink about 12:50 a.m. on October 6, 1990. While at the restaurant, Speeks also observed a man with an unkempt appearance, who appeared to be thirty years of age and of medium height, driving a cream-colored station wagon with wood siding through the parking lot several times. As Speeks left the restaurant, he saw that the man was standing on the right side of the building. Speeks also saw that Charity was sitting on a curb located on the same side of the building. Sergeant Mike Spraker of the Chesterfield County Police Department testified that Mueller customarily drove a cream-colored station wagon which had wood siding.

In conversations with the police on October 8 and 9, 1990, Mueller admitted speaking with a young, white female on the night of October 5, 1990, at a fast food restaurant that might have been near the skating rink. As a result of information gained in their investigation, the police searched for Charity's body near Mueller's home and on February 8, 1991, they found "a clump of hair and what looked like some white bone sticking out of the ground." Thereupon, the police exhumed Charity's body, which had been buried about 900 feet behind Mueller's house. An investigator also found a knife sticking in the ground about 174 feet from the grave.

The police arrested Mueller on February 12, 1991. After being advised of his *Miranda* rights, Mueller agreed to talk with Detective R. Wayne Garber of the Chesterfield County Police Department and John M. Palfi, an FBI special agent. Garber and Palfi interrogated Mueller for approximately four and one-half hours. During this interrogation, Mueller stated several times that he was ready to go to jail and that the police should put him in jail. Mueller did not state at any time that he wished to end the questioning. Approximately two hours into the interrogation, Agent Palfi left the room. Shortly thereafter, Mueller asked Detective Garber, "Do you think I need an attorney here?" Garber shook his head slightly from side to side while holding his arms out and his palms up in a shrug-like manner, stating, "You're just talking to us."

Several minutes later, Mueller confessed to the crime. Mueller stated that he had agreed to give Charity a ride home from the restaurant but that he drove her to his house instead. He admitted that he was thinking about having sex with her and he stated that he thought she was 18 or 19 years old. Charity was approximately 4'8" tall and weighed 90 pounds. Mueller stated that Charity agreed to have sex with him, and she told him that she wanted to go home afterward. Mueller took Charity to the woods behind his house where he had intercourse with her. He stated that although he had a knife nearby, he did not use it.

Mueller stated that he strangled Charity to death because he was afraid that she would report the incident to the police. He also stated that he had been drinking heavily and that, the next morning, he did not know whether he had dreamed about the previous night's events or whether they actually had occurred. When he went to check the woods, he saw Charity's body. He then purchased a shovel from a local store, buried the body, and burned Charity's clothes and jewelry.

After making this confession, Mueller led the police to the site where he had buried the body. He also showed them where he had burned the clothing and jewelry, as well as the area where he had left the knife. This was the same area where the police earlier had found a knife. Additionally, Mueller showed the police the location where he had intercourse with Charity. This area was about 15 feet from where the knife was found.

Dr. Marcella Fierro, who conducted an autopsy on Charity's body, testified that Charity's throat had been cut to the depth of one inch, resulting in a horizontal cut on the epiglottis, which is located on the trachea. She further testified that such a cut would result in the severance of the carotid artery and the jugular vein. According to Dr. Fierro, a person suffering from such an injury would die after several minutes, and there were indications that Charity had bled before her death. Based on these facts, Dr. Fierro testified that the cause of death was an "acute neck injury."

Additionally, Dr. Fierro found that, upon examining the skin over the breast area, there were "irregular holes in the area where each nipple would be." Dr. Fierro testified that she believed this condition to be the result of an injury, but she could not determine its cause or whether it had occurred before or after death. Dr. Fierro's examination also revealed a "big gash" on the victim's upper left thigh. Dr. Fierro stated that this could be an injury but that she could not determine whether it had occurred before or after Charity's death. However, Dr. Fierro testified that if it were an injury, it would have resulted from application of a "blunt or sharp force." Dr. Fierro also determined that there were three tears to the hymenal ring of the vagina which were consistent with sexual penetration.

II.

ISSUES PREVIOUSLY RESOLVED

[1] Mueller's appeal raises certain legal issues which are resolved by our prior decisions. We reaffirm our previous rejection of these contentions. Therefore, we will not discuss them beyond giving citations to representative cases in which those issues were decided adversely to Mueller's claims. The issues raised here which have been expressly rejected by this Court are:

A. The death penalty violates the United States Constitution's prohibition against cruel and unusual punishment. *See George* v. *Commonwealth*, 242 Va. 264, 271, 411 S.E.2d 12, 16 (1991), *cert. denied*, 503 U.S. ___, 112 S.Ct. 1591 (1992); *Yeatts* v. *Commonwealth*, 242 Va. 121, 126, 410 S.E.2d 254, 258 (1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1500 (1992).

B. The aggravating circumstance of "vileness" set forth in the capital murder statute is unconstitutionally vague. *See Spencer* v. *Commonwealth*, 238 Va. 563, 569, 385 S.E.2d 850, 853 (1989), *cert. denied*, 493 U.S. 1093 (1990)(Spencer III); *Gray* v. *Commonwealth*, 233 Va. 313, 320-21, 356 S.E.2d 157, 161, *cert. denied*, 484 U.S. 873 (1987).

C. The verdict form was defective because it did not list the mitigating factors mentioned in the statute. *See Buchanan* v. *Commonwealth*, 238 Va. 389, 416-17, 384 S.E.2d 757, 773 (1989), *cert. denied*, 493 U.S. 1063 (1990); *Watkins* v. *Commonwealth*, 229 Va. 469, 491, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099 (1986); *LeVasseur* v. *Commonwealth*, 225 Va. 564, 595, 304 S.E.2d 644, 661 (1983), *cert. denied*, 464 U.S. 1063 (1984).

III.

ASSIGNMENTS OF ERROR WAIVED

[2] Because Mueller did not address in his brief assignments of error 7, 8, 9, 12, and 16, he is deemed to have waived them.[1] Rule 5:27(e); *see Quesinberry* v. *Commonwealth*, 241 Va. 364, 370, 402 S.E.2d 218, 222, *cert. denied*, 502 U.S. ___, 112 S.Ct. 113 (1991).

[1] These assignments of error are:

7. The Court erred in denying Defendant's Motion to Strike as to abduction, rape and capital murder.

8. The Court erred in refusing to give Defendant's instruction regarding intent to rape a person under the age of 13.

9. The Court erred in refusing to set aside the verdicts as to abduction, rape and capital murder.

12. The Court erred in permitting the jury to see a videotape of the excavation of the victim's body.

16. The Court erred in refusing to set aside the verdict.

IV.

PRE-TRIAL MATTERS

A. Admissibility of Mueller's February 12, 1991 Confession.

Mueller contends that the trial court erred in refusing to suppress his confession of February 12, 1991. He does not contest the adequacy of the *Miranda* warnings given at the outset of the interrogation, nor does he challenge the validity of his initial waiver of these rights. Rather, Mueller asserts only that Detective Garber's response to his question, "Do you think I need an attorney here?", invalidated the earlier *Miranda* warnings given to him. Thus, he contends that his subsequent confession was involuntary.

[3-4] In assessing the effect of Detective Garber's response on the voluntariness of Mueller's statement, we apply a well-established standard of review. In *Gray* v. *Commonwealth*, 233 Va. at 324, 356 S.E.2d at 163, we said:

> A defendant's waiver of his *Miranda* rights is valid only if the waiver is made knowingly, voluntarily and intelligently. *Miranda*, 384 U.S. at 475. Whether a statement is voluntary is ultimately a legal rather than factual question. *See Miller* v. *Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 450 (1985). Subsidiary factual questions, however, are entitled to a presumption of correctness. *Id.* at 112, 106 S.Ct. at 451. The test to be applied in determining voluntariness is whether the statement is the "product of an essentially free and unconstrained choice by its maker," or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). In determining whether a defendant's will has been overborne, courts look to "the totality of all the surrounding circumstances," *id.* at 226, including the defendant's background and experience and the conduct of the police, *Correll* v. *Commonwealth*, 232 Va. 454, 464, 352 S.E.2d 352, 357 (1987); *Stockton*, 227 Va. at 140, 314 S.E.2d at 381.

The record shows that Mueller was 42 years old at the time he made this confession and that he had a high school equivalency

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diploma. Prior to the interrogation, Detective Garber advised Mueller of his rights under *Miranda* and Mueller stated that he understood each of those rights.

Earlier investigative efforts in this case also demonstrate Mueller's experience with police interrogation procedures. On October 9, 1990, Garber read a "Miranda Right Form" to Mueller. After Garber ascertained that Mueller understood the content of the form, Mueller signed a written waiver of his *Miranda* rights. On two occasions after signing this waiver, Mueller exercised his right to terminate police questioning.

In addition, the record shows that several years earlier, Mueller had been informed of and had waived his *Miranda* rights on three occasions. On each of these occasions, he executed a form waiving his *Miranda* rights, and he gave a statement to the police.

We also note that, during the February 12, 1991 interrogation, Mueller made some statements which further demonstrate that he was aware of the consequences of talking to the police. Before confessing, Mueller expressed concern regarding where he would be incarcerated, given the serious nature of the crimes. After confessing to the crimes, he told Detective Garber and Agent Palfi that he had wanted "to get it off his chest." At this time, Mueller further stated, "I got death coming to me. I knew it as soon as I opened my mouth."

[5] We also consider the factual findings made by the trial court concerning Mueller's confession. The trial court found that Mueller knew how to ask for the assistance of legal counsel, as evidenced by his request for such assistance on October 9, 1990, during the course of a prior interview with Detective Garber and Agent Palfi; that the police properly advised Mueller of his *Miranda* rights on February 12, 1992; and that he understood those rights prior to confessing to the crimes. The trial court further found that Mueller's question to Detective Garber on February 12, 1991 was not an expression of a desire for the assistance of counsel.

Mueller does not assert that these factual findings are unsupported by evidence taken at the suppression hearing. Based on our review of this evidence, we conclude that the factual findings of the trial court are supported by the record and, therefore, we accord them substantial weight in our determination whether Mueller's statement was voluntary. *See Miller* v. *Fenton*, 474 U.S. 104, 112 (1985).

[6] Based on the above evidence and findings, we hold that Mueller's question, "Do you think I need an attorney here?", and Detective Garber's response, did not invalidate Mueller's earlier waiver of his *Miranda* rights. Initially, we find that Mueller's question to Garber did not constitute a request for counsel. In *Eaton* v. *Commonwealth*, 240 Va. 236, 253-54, 397 S.E.2d 385, 395-96 (1990), *cert. denied*, 502 U.S. ___, 112 S.Ct. 88 (1991), this Court stated that "custodial interrogation must cease, when the accused, having received *Miranda* warnings and having begun to respond to the questions of the authorities, 'has *clearly* asserted his right to counsel.'" (quoting *Edwards* v. *Arizona*, 451 U.S. 477, 485 (1981)) (emphasis in original). In *Eaton*, the police had continued to question the defendant after he had asked, "You did say I could have an attorney if I wanted one?" 240 Va. at 250, 397 S.E.2d at 393. This Court held that the defendant's question did not constitute an unambiguous request for counsel so as to invoke the *Edwards* rule. 240 Va. at 254, 397 S.E.2d at 396. Here, we likewise hold that Mueller's question to Detective Garber did not constitute an unambiguous request for counsel.

[7] Mueller contends, however, that even if his question did not constitute a request for the assistance of counsel, Detective Garber's response nevertheless invalidated Mueller's earlier waiver of his *Miranda* rights. We disagree. Based on our review of the videotape of the interrogation, we observe that Garber did not, as contended here by Mueller, respond to Mueller's question by answering "No." Rather, he replied, while shrugging and shaking his head slightly from side to side, "You're just talking to us." Considering the totality of the circumstances detailed above, including Mueller's prior experience in the criminal justice system and his previous contacts with Detective Garber and Agent Palfi, we find that Garber's response to the question at issue did not invalidate Mueller's earlier waiver of his *Miranda* rights. Moreover, since Garber's response to Mueller did not constitute an unambiguously negative reply, the information provided in the initial advisement of *Miranda* rights was not altered by this response.

We also reject Mueller's assertion that his repeated statements that he wanted to be taken to jail constituted an invocation of his right to terminate police questioning. In *Akers* v. *Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975), this Court confronted a similar situation where the defendant, after being advised of his *Miranda* rights, stated, "Do I have to talk about it now?" In response to this

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question, the police merely continued the interrogation. This Court held that the defendant's question was not an invocation of his right to terminate questioning, stating, "Defendant's inquiry was no more than an impatient gesture on his part. If defendant had desired to end the interrogation, he could have simply said, 'I do not want to answer any more questions.'" 216 Va. at 46, 216 S.E.2d at 32.

[8] Based on our review of the videotape of Mueller's interrogation, we likewise conclude that his statements regarding going to jail were simply impatient gestures and that they did not constitute an invocation of his right to terminate the interrogation. After each such statement, Mueller continued to talk with Garber and Palfi, giving no indication that he wanted to end the discussion. Moreover, when Palfi asked him whether he would rather talk to other officers instead of himself and Garber, Mueller responded, "I've been talking to you for four months. I've established a pretty good relationship with you guys." Finally, the record shows that, during two previous interviews with Garber, Mueller unambiguously had terminated the police interrogation by standing up and stating that he wanted the officers to stop questioning him.

[9] For these reasons, on our independent review of the record, we conclude, as a matter of law, that Mueller's statement of February 12, 1991 was voluntary and admissible.

B. Change of Venue.

Mueller filed a pretrial motion requesting a change of venue on the ground that extensive media coverage of the murder made it impossible for him to receive a fair trial in Chesterfield County. The articles and television reports he adduced included information that Mueller was charged with the murder of Charity Powers, that Mueller had a previous criminal record which included prior rape convictions, and that Mueller had confessed to raping and killing Charity. Mueller also presented to the trial court affidavits from residents of Chesterfield County stating that, based on what they had seen or heard in the media, they believed that Mueller probably was guilty of raping and killing Charity Powers. The trial court took the motion for change of venue under advisement. Mueller renewed this motion on the day of trial. After the jury was empaneled, the trial court denied the motion, stating that it was satisfied that the jury panel was impartial.

Mueller argues that the trial court erred in denying his motion for a change of venue because the media coverage was inflammatory and contained information regarding his confession and his prior criminal record. Mueller contends that these aspects of the media coverage necessitated a change of venue in order to protect his rights afforded under the Sixth, Eighth, and Fourteenth amendments of the United States Constitution. We disagree.

[10-11] Initially, we observe that there is a presumption that a defendant can receive a fair trial from the citizens of the jurisdiction in which the offense occurred. It is the burden of the defendant to overcome this presumption by demonstrating that the feeling of prejudice on the part of the citizenry is widespread and is such that would "be reasonably certain to prevent a fair trial." *Stockton* v. *Commonwealth*, 227 Va. 124, 137, 314 S.E.2d 371, 380, *cert. denied*, 469 U.S. 873 (1984)(citation omitted). Further, the decision whether to grant a change of venue lies within the sound discretion of the trial court. *George*, 242 Va. at 274, 411 S.E.2d at 18; *LeVasseur*, 225 Va. at 577, 304 S.E.2d at 651. Therefore, the trial court's ruling on this issue will not be disturbed on appeal unless the record affirmatively shows an abuse of discretion. *Id.*

Extensive media coverage which discloses information about the accused, including his criminal record, does not, of itself, mandate a change of venue. *Buchanan*, 238 Va. at 407, 384 S.E.2d at 767; *Mackall* v. *Commonwealth*, 236 Va. 240, 250, 372 S.E.2d 759, 766 (1988), *cert. denied*, 492 U.S. 925 (1989). A significant factor in determining whether a change of venue is warranted is whether the media reports are factual and accurate. *Buchanan*, 238 Va. at 407, 384 S.E.2d at 768. Here, Mueller does not challenge the factual nature or accuracy of the media coverage surrounding his case.[2] Moreover, we find no indication in the record that any of the media reports were inaccurate.

[12] Another significant factor in determining whether the venue of a trial should be changed is the difficulty encountered in selecting a jury. *Id.* In the present case, 47 venirepersons were examined.

[2] Mueller argues, however, that an editorial published in the *Richmond Times - Dispatch*, five months before the hearing on his motion for change of venue, was inflammatory. While the editorial did refer to the murder of a child as being "among the sharpest evidence of the utter corruptibility of man," it also stated that Mueller's guilt in the Powers case had yet to be established. Accordingly, we do not view this article as being prejudicial to Mueller's right to receive a fair trial.

Of this number, only nine had to be excused because of their predisposition toward belief in Mueller's guilt.

As the United States Supreme Court has stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. *Dowd*, 366 U.S. 717, 723 (1961). Here, given the factual nature of the media coverage and Mueller's tacit acquiescence in the accuracy of its content, as well as the relative ease with which a jury was empaneled, we hold that the trial court did not abuse its discretion in denying Mueller's motion for a change of venue.

V.

JURY SELECTION

A. Refusal to Allow Questions on Voir Dire.

Mueller next argues that the trial court erred in refusing to allow certain questions on voir dire which he contends were necessary to determine whether any prospective jurors were predisposed toward imposing the death penalty. Mueller asserts that he should have been allowed to ask these questions because the Commonwealth was entitled to conduct the opposite line of questioning, *viz.*, whether certain prospective jurors were unalterably opposed to the death penalty. *See Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985); *Adams* v. *Texas*, 448 U.S. 38, 45-46 (1980); *Witherspoon* v. *Illinois*, 391 U.S. 510, 522 (1968).

A total of 47 persons comprised the venire. From this group, 23 persons were struck for cause. Mueller objected to the trial court's qualification of ten of the remaining 24 members. However, he objected to only two members, Ruby Moschler and Max Zoeckler, on the grounds that they were "death prone."

[13] An examination of Mueller's voir dire of Ruby Moschler reveals that the trial court did not reject any question regarding

Moschler's ability to impose a life sentence.[3] Since Mueller did not proffer any such question which was rejected by the trial court, he may not claim on appeal that his right to question this prospective juror was violated. *See Morgan* v. *Illinois*, ___ U.S. ___, ___, 112 S.Ct. 2222, 2229 (1992); *LeVasseur*, 225 Va. at 585, 304 S.E.2d. at 655.

During his voir dire of Max Zoeckler, Mueller sought to ask, "[I]f in sitting in the guilt phase of the trial you conclude beyond a reasonable doubt that Mr. Mueller has raped and killed a 10 year old child, don't you think that death is the only appropriate punishment for that?" The trial court sustained the prosecutor's objection to this question. Counsel for Mueller then attempted to ask Mr. Zoeckler,

> [I]f you sit in the guilt phase of the trial and you determine beyond a reasonable doubt that Mr. Mueller raped and abducted and killed a 10 year old girl, and then you sit in the sentencing phase and listen to the evidence in aggravation and the evidence in mitigation, aren't you going to think the only appropriate sentence is death?

The trial court also sustained the prosecutor's objection to this question.

[14] We hold that the trial court did not err in refusing both of these questions since they were argumentative and provided the prospective juror with no basis upon which to express an opinion. *See Buchanan*, 238 Va. at 402, 384 S.E.2d at 765; *Patterson* v. *Commonwealth*, 222 Va. 653, 659 n.*, 283 S.E.2d 212, 216 n.* (1981). Further, even if we disregard the argumentative nature of these questions, we still find that the trial court's ruling did not violate Mueller's right to a fair and impartial jury.

This Court has held that where the voir dire questioning conducted by the trial court otherwise "assure[s] the removal of those

[3] In fact, Mueller was allowed to ask Moschler whether she would be "predisposed towards the death penalty" if she heard facts which showed Mueller to be guilty beyond a reasonable doubt. Moschler replied, "[I]f the evidence in a trial proved to me that he had done all these things, I will be in favor of [the death penalty]." Moschler clarified this answer by stating that she would make this decision only after weighing all the evidence in the penalty phase. She also stated that she could consider imposing a life sentence. Further, in response to a question posed by counsel for Mueller, she stated that there was evidence that could keep her from imposing the death penalty.

who would invariably impose capital punishment," it is not reversible error for the trial court to deny defense counsel additional questions on this subject. *Turner* v. *Commonwealth*, 221 Va. 513, 523, 273 S.E.2d 36, 42-43 (1980), *cert. denied*, 451 U.S. 1011 (1981). This approach is in accord with the holding of the United States Supreme Court set forth in *Morgan*, ___ U.S. at ___, 112 S.Ct. at 2232-33.

In *Morgan*, the Court held that the defendant's right to a fair and impartial jury was violated by the trial court's refusal to inquire whether prospective jurors would vote automatically for imposition of the death penalty. The defendant had requested that the trial court ask the jurors: "If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" ___ U.S. at ___, 112 S.Ct. at 2226.

In reaching its decision, the Supreme Court noted that the trial court had not asked any questions on this subject. Instead, it had only posed general questions regarding the prospective jurors' ability to be fair and impartial and follow the instructions of the court. The Supreme Court held that such general questions were inadequate because a prospective juror could, in good conscience, respond affirmatively and yet be unaware that certain beliefs about the death penalty would impede his or her performance as a juror. ___ U.S. at ___, 112 S.Ct. at 2226; 2232-33.

[15] In the case before us, the trial court did ask questions which probed whether prospective juror Zoeckler would automatically vote for the death penalty. At the beginning of Zoeckler's individual voir dire, the following dialogue took place:

> THE COURT: Do you have any moral or religious convictions that would prevent you from voting for the death penalty?
>
> MR. ZOECKLER: No.
>
> THE COURT: On the other hand of that if the Court instructed you also, and I will instruct you that one of the other penalties, a lesser penalty that you could consider is life imprisonment, could you fairly consider the lesser penalty in deciding on what penalties the defendant should receive, by punishment what he should receive?
>
> MR. ZOECKLER: I could consider it, yes.

THE COURT: If the Court instructed you that it was death or life imprisonment, would you fairly consider life imprisonment as well as the death penalty?

MR. ZOECKLER: I don't know, no.

THE COURT: Let me see if I have got you right. First, if I instructed you that there are two penalties that you could punish the defendant for, one is the death penalty, you say you have no moral or religious convictions that would prevent you from voting for the death penalty?

MR. ZOECKLER: Right.

THE COURT: Also, if the Court instructed you that the life imprisonment was a lesser penalty, would you consider the lesser punishment?

MR. ZOECKLER: Yes, I would consider it.

In responding to the prosecutor's questions, Zoeckler reiterated this position, stating that he would not vote automatically to impose either sentence. In response to questions from Mueller's counsel, Zoeckler stated that he would wait to hear the evidence in the penalty phase before deciding which penalty to impose. Viewing Zoeckler's voir dire as a whole, we find that he was questioned sufficiently to determine whether he would automatically impose the death penalty. Therefore, we cannot say that the trial court abused its discretion in refusing to allow further questions which Mueller proposed. *See Morgan*, ___ U.S. at ___, 112 S.Ct. at 2232-33; *Turner*, 221 Va. at 523, 273 S.E.2d at 43; *LeVasseur*, 225 Va. at 584, 304 S.E.2d at 655.[4]

[4] Mueller also contends that the trial court erred in refusing to allow him to ask Theresa Gryder, who was eventually empaneled on the jury, the following question:

> First you decide whether or not the person is guilty or innocent, so given that you have already decided that, okay, and you have determined that he, in fact, did abduct, rape and murder a 10 year old child, don't you feel then that the death sentence would be the only appropriate punishment?

Because Mueller did not object to the trial court's determination that Gryder was qualified to serve on the jury, he has not preserved his right to challenge this determination. *See Morgan*, ___ U.S. at ___, 112 S.Ct. at 2229; Rule 5:25.

B. Refusal to Disqualify Venire.

Mueller contends that the comments of one venireperson improperly tainted the group and that the trial court erred in failing to disqualify the entire venire for this reason. During the trial court's questioning of the first group of 14 prospective jurors, David Clark told the court that another prospective juror, Helen Blackwell, stated in the jury waiting room that she had "some strong feelings about the innocence or guilt of the defendant." The trial court then asked the entire panel, "[H]ave any of you acquired any information about the alleged offense or the accused from news media or other sources, and if so, would that information affect your impartiality in the case?" The trial court postponed questioning of those who answered in the affirmative until the individual questioning of each prospective juror.[5]

When questioned individually, only Robert Mitchell referred to comments which he had overheard in the waiting room. Mitchell stated that he had heard another prospective juror say that Mueller had confessed. Another prospective juror, Ruby Moschler, stated that she had not overheard any prospective juror making statements in the waiting room.

At the end of the voir dire, the trial court asked the entire venire whether any member had heard anything since being questioned by the court which would change any answer he or she had given previously. No one answered in the affirmative.

[16] Mueller cites no evidence to support his contention that the venire was tainted by the comments of Helen Blackwell. Further, the record reflects that both counsel had ample opportunity to question each prospective juror as to what he or she had heard, in the waiting room and elsewhere, about the case. This questioning revealed no evidence that Blackwell's comment had influenced or prejudiced the prospective jurors in any way. In fact, Mitchell, the only prospective juror who mentioned having heard Blackwell's comment, said that the statement he overheard was "a casual thing" and that it was "not important to me at that time."

The trial court is vested with discretion to determine whether the parties have had a "full and fair" opportunity to determine whether a juror "stands indifferent to the cause." *Buchanan*, 238 Va. at 401,

[5] The trial court excused Helen Blackwell for cause based on its determination that she had already formed an opinion in the case.

384 S.E.2d at 764; *LeVasseur*, 225 Va. at 581, 304 S.E.2d at 653. Since the answers to the questions posed by the trial court, as well as by counsel for both parties, indicated that none of the prospective jurors was affected by Helen Blackwell's statement, we hold that the trial court did not abuse its discretion in refusing to disqualify the entire venire.

C. Refusal to Strike Prospective Jurors for Cause.

[17] Mueller next argues that nine prospective jurors who had knowledge of his prior record or confession should have been stricken for cause. Our standard of review here is well-settled. Based on the trial court's ability "to observe and evaluate the apparent sincerity, conscientiousness, intelligence, and demeanor of prospective jurors first hand," we will not disturb its rulings on challenges for cause, unless there is manifest error. *Pope* v. *Commonwealth*, 234 Va. 114, 123-24, 360 S.E.2d 352, 358 (1987), *cert. denied*, 485 U.S. 1015 (1988). In making this determination, we decide whether the voir dire as a whole shows that a juror's performance of his or her duty, in accordance with the trial court's instructions and the oath taken, would be prevented or substantially impaired. *Adams*, 448 U.S. at 45; *Eaton*, 240 Va. at 246, 397 S.E.2d at 391; *George*, 242 Va. at 276, 411 S.E.2d at 19.

Additionally, we observe that jurors need not be totally unaware of the facts and issues involved in the case. *Irvin*, 366 U.S. at 722. This is true even in instances where a juror has previous knowledge of a defendant's past crimes and of the current charge against the defendant. *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975).

In the case before us, the trial court initially questioned the prospective jurors collectively concerning whether (1) there was anything which would prejudice them against either party, (2) they were aware of any bias or prejudice against either party, and (3) they understood that a defendant is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt.[6] Additionally, each prospective juror was questioned individually by the trial court and counsel for both parties to determine whether pretrial publicity had caused him or her to be biased.

[6] Donald Meincke and Dale Morris were questioned individually regarding the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt.

Raymond LaFountain

In response to a question by Mueller's counsel, Raymond LaFountain stated that he had heard from television reports that Mueller had been charged with the crime, that Charity's body had been found near Mueller's home, and that Mueller had made a confession to the police. However, LaFountain stated that he had not formed an opinion as to Mueller's guilt or innocence. LaFountain also noted that he did not "know a whole lot about [the case] other than the fact that the news has said this happened, this gentleman was accused, and so forth." LaFountain was unaware of Mueller's prior criminal record.

Cynthia Woods

Cynthia Woods stated she had seen television reports and read newspaper articles which discussed the crime and Mueller's arrest. She also stated, "I think he had a record," but she did not remember any details. Woods, an eighth grade teacher, also told Mueller's counsel that, to a limited extent, she had discussed the case with her students. Woods stated that she did not know much about the defendant, that she had "not been around this summer," and that she had not formed an opinion regarding Mueller's guilt or innocence.

Max Zoeckler

Max Zoeckler stated he had heard media reports concerning Charity's disappearance and the discovery of her body. He did not recall hearing anything about Mueller's connection with the case, other than "[i]t may been [sic] that he had some prior acquaintanceship with the little girl." Zoeckler further stated that he had not formed an opinion regarding Mueller's guilt or innocence.

Patricia Squire

In response to questioning by the prosecutor, Patricia Squire stated she had heard in media reports that Mueller had been arrested and she recalled "there had been another point in which he had similar charges." Squire also had heard that the victim's body had been

dismembered.[7] Upon further questioning by the prosecutor whether she had formed an opinion regarding Mueller's guilt or innocence, based on what she had seen or heard from the media, Squire responded, "I felt like he had evidence that very much swayed towards him being guilty. . . . In terms of myself deciding whether he is guilty or not, no, I have not made any decision." She then reaffirmed this response by stating, "I haven't formed an opinion." She further stated that she would be able to put aside any information she had learned from the media and base her decision in this case on the evidence presented in court.

In response to a question posed by Mueller's counsel, Squire again stated that, based on the information she had obtained from the media, "it probably weighs heavily in terms of thinking he might be guilty." However, upon further questioning by Mueller's counsel, Squire stated that her previous knowledge of the case would not interfere with her ability to follow the trial court's instructions and that she could put the fact of Mueller's prior criminal convictions out of her mind. She also stated that her previously acquired knowledge would not interfere with her ability to apply a presumption of innocence in the case.

Elizabeth Davis

Responding to a question from the trial court, Elizabeth Davis stated that all she had seen or heard in the media coverage of this case was the fact that Charity Powers had disappeared. Davis later responded to the prosecutor that she understood the presumption of a defendant's innocence, the prosecution's burden of proof of guilt beyond a reasonable doubt, and that she would apply the trial court's instructions to the evidence in making her decision. In response to a question from Mueller's counsel, Davis stated that, in conversations with co-workers about the case, she had heard that Mueller had confessed. However, Davis also stated that she had not formed an opinion regarding Mueller's guilt or innocence.

Donald Meincke

Donald Meincke stated he had heard about the case in television and newspaper coverage, including reports that Mueller had been

[7] Squire was incorrect in her belief that the body had been dismembered.

arrested, had confessed his guilt, and that he previously had been convicted of other crimes. However, Meincke further stated that he could put aside what he had learned from the media, that he had not formed an opinion regarding Mueller's guilt or innocence, that he could base his decision on evidence heard in court, and that he could be impartial.

Dale Morris

Dale Morris stated that he was aware of the case and Mueller's confession of guilt from television news reports. Morris indicated that he had not formed an opinion about Mueller's guilt or innocence and that he felt he could decide the case based entirely on the evidence presented in court.

Robert Mitchell

Robert Mitchell stated he knew, based on media coverage, that Mueller was arrested for the murder of Charity Powers, but he did not "know that much as to what the evidence was that caused his arrest." Although Mitchell initially stated he believed, as a general rule, that a person is usually guilty if arrested, he later stated that he did not know the facts of the present case and had not formed an opinion regarding the guilt or innocence of Mueller.

Ruby Moschler

Ruby Moschler stated she learned from media reports that Mueller had been arrested for the murder of Charity Powers. However, she did not remember anything else about Mueller and she said that she had formed no opinion regarding his guilt or innocence. Moschler further stated that, while she did not already feel that Mueller was guilty, she was "relieved that he ha[d] been arrested." Upon questioning by Mueller's counsel, Moschler responded that she would weigh the evidence presented in the courtroom to determine which penalty to impose, that she would consider both penalties, and that she had no fixed opinion regarding Mueller's guilt.

[18] In our review of the whole voir dire testimony of each of these nine prospective jurors, we find no indication that each could not "lay aside [his or her] impressions or opinions and render a verdict based on the evidence presented in court." *Pope*, 234 Va. at

124, 360 S.E.2d at 358. Accordingly, we find no error in the trial court's refusal to strike each of them for cause. *Id.*

VI.

GUILT PHASE — MOTION FOR MISTRIAL

Mueller contends that he was entitled to a mistrial based on the prosecutor's failure to inform him that witness Kevin Speeks had not made a positive identification of him when shown a photo array consisting of seven pictures. The record is silent, however, regarding whether Mueller's photograph was among the seven photographs shown to Speeks. Nevertheless, Mueller argues that Speeks's failure to identify him was exculpatory evidence within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963). We disagree.

[19] Exculpatory evidence is evidence favorable to a defendant which must be disclosed by the prosecution where it is material to the defendant's guilt or punishment. *Id.* at 87. The record before us shows that the prosecutor informed the trial court that he had investigated the matter of the photo array upon learning about it for the first time at trial. He was unable to determine which police officer showed Speeks the photographs. Thus, there is no evidence before us that Speeks was shown a photograph of Mueller or of any specifically identified individual. Moreover, since Speeks did not identify any photograph as representing a person he had seen at the fast food restaurant, but merely stated that one photograph *resembled* a man who was there, the trial court correctly determined that this information did not constitute exculpatory evidence. *Townes* v. *Commonwealth*, 234 Va. 307, 324, 362 S.E.2d 650, 659 (1987), *cert. denied*, 485 U.S. 971 (1988).

VII.

PENALTY PHASE

A. Parole Ineligibility.

Mueller argues that the trial court violated his due process rights by refusing to instruct the jury that, pursuant to Code § 53.1-151(B1), he would not be eligible for parole if convicted of the rape of Charity Powers, since this would be his third rape conviction. He also asserts that he should have been allowed the opportunity to

introduce evidence regarding parole ineligibility in mitigation of punishment at the penalty phase of the trial.

[20] We hold that the trial court did not err in its rulings here. This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration. *King* v. *Commonwealth*, 243 Va. 353, 367-68, 416 S.E.2d 669, 677 (1992); *Eaton*, 240 Va. at 248-49, 397 S.E.2d at 392-93; *Watkins* v. *Commonwealth*, 238 Va. 341, 351, 385 S.E.2d 50, 56 (1989), *cert. denied*, 494 U.S. 1074 (1990). Further, the United States Supreme Court has expressly left the determination of this question to the individual states, as a matter of state law. *California* v. *Ramos*, 463 U.S. 992, 1013-14 (1983); *Eaton*, 240 Va. at 249, 397 S.E.2d at 392-93. We perceive no reason in the case before us to depart from our prior rulings on this subject.

[21] We find no merit in Mueller's contention that, notwithstanding the prior rulings of this Court, he should have been permitted to present evidence of parole ineligibility because two of the Commonwealth's witnesses referred to his prior parole history in their testimony during the penalty phase of the trial. In *Pope*, 234 Va. at 126-27, 360 S.E.2d at 360, this Court held that evidence of a defendant's prior parole history is admissible during the penalty phase of a capital murder trial, where the Commonwealth is seeking the death penalty based on the "future dangerousness" predicate. This Court explained that, under Code § 19.2-264.4, the jury is required, prior to imposing the death penalty based on a finding of future dangerousness, to consider the defendant's "prior history." The fact that a defendant has had the benefit of parole supervision is part of this prior history. *See id.* Thus, this Court has drawn a clear distinction between the admissibility of a defendant's parole history and evidence of his future parole eligibility.

B. Cross-Examination of Mueller.

Mueller argues that the trial court erred in permitting the Commonwealth to question him about his prior convictions for sexual assault, as well as the present offenses against Charity Powers. We disagree. During his direct testimony, Mueller acknowledged that he had prior convictions for sexual offenses and he stated that he was refused parole repeatedly because of these convictions. Mueller also testified on direct examination about the circumstances under which

his life had deteriorated and he related the fact that he had spent two years in a California state hospital.

[22] Once a defendant has testified as to certain matters, the proper scope of cross examination lies within the sound discretion of the trial court. *See Savino* v. *Commonwealth*, 239 Va. 534, 545, 391 S.E.2d 276, 282, *cert. denied*, 498 U.S. ___, 111 S.Ct. 229 (1990). Considering the above testimony, we find that the trial court did not abuse its discretion in allowing the Commonwealth to question Mueller about his prior convictions for sexual offenses and about whether he had learned anything as a result of his commission of the present offenses.

C. Admissibility of Dr. Fierro's Testimony.

[23] Mueller contends that portions of the testimony of Dr. Marcella Fierro, who conducted the autopsy of the victim's body, should not have been admitted because they included opinion evidence which was not stated to a reasonable degree of medical certainty. However, Mueller does not identify the portions of Dr. Fierro's testimony which he claims were admitted improperly. Further, the record shows that, during Dr. Fierro's testimony in the guilt phase of the trial, Mueller made no objection to the fact that her opinions were not stated to a reasonable degree of medical certainty.[8] Accordingly, he may not complain on appeal regarding the admission of this opinion evidence. *Spruill* v. *Commonwealth*, 221 Va. 475, 478-79, 271 S.E.2d 419, 421 (1980); Rule 5:25.

During the penalty phase of the trial, the prosecutor questioned Dr. Fierro regarding certain photographs which depicted the condition of the victim's body. At this point, Mueller did object to Dr. Fierro's testimony. He argued that any opinion on her part regarding the cause of the injuries, as well as the cause of death, would not be admissible since it could not be stated to a reasonable degree of medical certainty.

[24] This objection, however, was wholly inapposite to the testimony which Dr. Fierro gave at the penalty phase of the trial. Here,

[8] Although prior to Dr. Fierro's testimony, Mueller informed the court that the defense was "going to have objections to some of the things we think they are going to try to get in, because we don't think there is a reasonable degree of certainty," Mueller never made a contemporaneous objection based on Dr. Fierro's stated degree of certainty during her testimony in the guilt phase of the trial.

Dr. Fierro's testimony dealt only with descriptions of the photographs which the prosecution sought to introduce. Dr. Fierro gave no further testimony during the penalty phase of the trial. Since her testimony at this stage of the trial involved only a description of the condition of the body, as depicted in the photographs, it did not constitute opinion evidence and was properly admitted.

D. Sufficiency of Evidence of Vileness.

[25] Mueller asserts that the evidence in this case was insufficient to meet the vileness predicate set forth in Code § 19.2-264.2. We disagree. A finding of vileness must be based on conduct which is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Code § 19.2-264.2. Proof of any one of these three components will support a finding of vileness. *Id.*; *see Poyner* v. *Commonwealth*, 229 Va. 401, 424, 329 S.E.2d 815, 831, *cert. denied*, 474 U.S. 865 (1985). We hold that the testimony here sufficiently established Mueller's aggravated battery of the victim, as well as his depravity of mind.

[26] First, the record demonstrates that Mueller perpetrated an aggravated battery on Charity Powers within the meaning of Code § 19.2-264.2. This Court has defined "aggravated battery" in this context to mean "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith* v. *Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979). Mueller stated that he strangled Charity to death after he raped her. Dr. Fierro testified, however, that Charity's throat had been cut and that a person suffering this type of wound would live for several minutes. We find that this evidence from Dr. Fierro is sufficient to establish an aggravated battery because the victim was subjected to "an interval of agony awaiting death." *Stout* v. *Commonwealth*, 237 Va. 126, 134, 376 S.E.2d 288, 292, *cert. denied*, 492 U.S. 925 (1989); *Edmonds* v. *Commonwealth*, 229 Va. 303, 313, 329 S.E.2d 807, 814, *cert. denied*, 474 U.S. 975 (1985).

[27] The record before us also contains sufficient evidence to establish Mueller's depravity of mind. Depravity of mind can be established by proof of psychological torture of the victim. *Poyner*, 229 Va. at 425, 329 S.E.2d at 832. We find that the jury reasonably

could have inferred from the evidence that Charity Powers was tortured psychologically during the sequence of events which culminated in her murder. This ten year old child was alone late at night after being unable to find Steve Harris, who was supposed to have taken her home. Mueller offered to help her out of this frightening situation by telling her that he would take her home. Instead of keeping that promise, he took her into the woods, raped her, and then killed her. This conduct extended over a period of time and under such circumstances as to permit an inference of psychological torture. *See id.*

[28] Further evidence of Mueller's depravity of mind is Dr. Fierro's testimony that there were holes in the breast area where the victim's nipples would have been and that she believed that this condition resulted from an injury inflicted on the victim. Evidence of such sexual mutilation, whether occurring before or after death, evinces a depravity of mind within the meaning of Code § 19.2-264.2. *See Jones* v. *Commonwealth*, 228 Va. 427, 447-48, 323 S.E.2d 554, 565-66 (1984), *cert. denied*, 472 U.S. 1012 (1985).

E. Verdict Form.

Mueller argues that the verdict form submitted to the jury did not properly inform it of the sentencing options. He contends that the structure of the verdict form influenced the jury to impose the death sentence rather than life imprisonment. We find no merit in this contention.

Instruction A informed the jury that it was required to choose between sentences of death and life imprisonment. This instruction also informed the jury that it could not sentence Mueller to death unless the prosecution proved beyond a reasonable doubt at least one of the two aggravating factors of vileness or future dangerousness. Further, Instruction A directed the jury that, even if the prosecution had proved one or both of these aggravating factors, it was nevertheless free to fix Mueller's punishment at life imprisonment, "if you believe from all the evidence that the death penalty is not justified."

Instruction B set forth four alternative verdicts: (1) a sentence of death based on a finding of both aggravating factors; (2) a sentence of death based on a finding of future dangerousness; (3) a sentence of death based on a finding of vileness; and (4) a life sentence based on all of the evidence in aggravation and mitigation of the offense.

To indicate its verdict, the jury was instructed to "[c]ross out any paragraph, word or phrase which you do not find beyond a reasonable doubt."

[29] We hold that this sentencing form, in conjunction with Instruction A, fully apprised the jury of its sentencing options. The structure of the form did not, as contended by Mueller, favor any of the options presented. Further, since the jury was told in Instruction A that it could choose the penalty of life imprisonment, even if it found either or both aggravating factors, the information concerning the option of life imprisonment was complete. *See Stockton* v. *Commonwealth*, 241 Va. 192, 215, 402 S.E.2d 196, 209 (1991), *cert. denied*, 502 U.S. ___, 112 S.Ct. 280 (1991); *LeVasseur*, 225 Va. at 594-95, 304 S.E.2d at 661.

VIII.

SENTENCE REVIEW

Code § 17-110.1(C) requires us to review the imposition of the death sentence on Mueller, based on the trial record, to determine whether (1) it was imposed under the influence of passion, prejudice, or any other arbitrary factor; or (2) it is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Initially, we note that Mueller does not contend that the death sentence was imposed under the influence of any of the above statutory factors, nor does he contend that the sentence is excessive or disproportionate to the penalty imposed in similar cases. Nevertheless, we have examined the records of all capital murder cases reviewed by this Court, pursuant to Code § 17-110.1(E), giving particular attention to those cases where the death penalty was based upon both the "future dangerousness" and the "vileness" predicates. Those cases are collected in *Spencer* v. *Commonwealth*, 238 Va. 295, 319-20, 384 S.E.2d 785, 800 (1989), *cert. denied*, 493 U.S. 1093 (1990) (Spencer II). Since *Spencer II*, we have decided several other capital murder cases where the death penalty was based on both predicates: *George* v. *Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991), *cert. denied*, 503 U.S. ___, 112 S.Ct. 1591 (1992); *Strickler* v. *Commonwealth*, 241 Va. 482, 404 S.E.2d 227, *cert. denied*, 502 U.S. ___, 112 S.Ct. 386 (1991); *Quesinberry* v. *Commonwealth*, 241 Va. 364, 402 S.E.2d 218, *cert. denied*, 502 U.S. ___, 112 S.Ct. 113 (1991); *Stockton* v. *Commonwealth*, 241 Va.

192, 402 S.E.2d 196 (1991), *cert. denied*, 502 U.S. ___, 112 S.Ct. 280 (1991); *Spencer* v. *Commonwealth*, 240 Va. 78, 393 S.E.2d 609, *cert. denied*, 498 U.S. ___, 111 S.Ct. 281 (1990) (Spencer IV); *Mu'Min* v. *Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990), *aff'd*, 500 U.S. ___, 111 S.Ct. 1899 (1991); *Smith* v. *Commonwealth*, 239 Va. 243, 389 S.E.2d 871, *cert. denied*, 498 U.S. ___, 111 S.Ct. 221 (1990); *Spencer* v. *Commonwealth*, 238 Va. 563, 385 S.E.2d 850 (1989), *cert. denied*, 493 U.S. 1093 (1990) (Spencer III); *Watkins* v. *Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989), *cert. denied*, 494 U.S. 1074 (1990).

[30] After reviewing these records, as well as cases in which life imprisonment was imposed, we conclude that Mueller's sentence of death was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of a similar nature. In fact, few of these cases equal or exceed both the vileness of this crime or the future dangerousness of this defendant.

As stated above, this case involves the rape, abduction, and murder of a ten year old child. Even under Mueller's account of the events, the victim suffered an exceedingly gruesome and painful death. The evidence of Mueller's future dangerousness was also overwhelming. Prior to these crimes, Mueller had committed several violent sexual assaults on women, including assaults on two of his own sisters. He testified that he did not feel remorse after committing two of those crimes. In addition to the testimony of Dr. Henry Gwaltney, the Commonwealth's expert witness, Mueller's own expert witness, Dr. Mariah Travis, testified that Mueller is an extremely dangerous person.

[31] Finally, based on our review of the record, we find nothing which suggests that Mueller's death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor.

IX.

CONCLUSION

We find no reversible error in the issues presented here. Having reviewed Mueller's sentence of death pursuant to Code § 17-110.1, we decline to commute the sentence. Accordingly, we will affirm the judgments in both cases.

Record No. 920287 - *Affirmed.*
Record No. 920449 - *Affirmed.*

ORIGINAL

Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NO. 92-7507

EVERETT LEE MUELLER

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S ATTACK UPON HIS CONFESSION ADVANCES LITTLE MORE THAN A STATE LAW, FACT-SPECIFIC ARGUMENT AND THEREFORE FAILS TO PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION?

II. WHETHER PETITIONER'S ARGUMENTS ON THE MERITS CONCERNING HIS CONFESSION AND THE VOIR DIRE ARE TOO INSUBSTANTIAL TO WARRANT REVIEW BY THIS COURT?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NO. 92-7507

EVERETT LEE MUELLER

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 244 Va. 386, 422 S.E.2d 380 (1992).

JURISDICTION

The petitioner does not assert the basis for this Court's jurisdiction in his petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions involved are recited in the petition at 2.

STATEMENT OF THE CASE

Petitioner was convicted by a jury in the Circuit Court of Chesterfield County, Virginia, on September 11, 1991 of capital murder in the commission of, or subsequent to, rape and in the commission of abduction with intent to defile Charity Powers. On September 12, 1991, Mueller was sentenced to death on the capital murder conviction. In addition, petitioner was convicted of abduction and rape and was sentenced to two terms in the penitentiary of life imprisonment. Thereafter, on December 19, 1991, the trial court sentenced petitioner in accordance with the verdict of the jury.

Petitioner then appealed his convictions to the Supreme Court of Virginia. On April 1, 1992, the State Supreme Court consolidated Mueller's appeal on the underlying offenses with his capital murder appeal. In a published opinion, the Supreme Court of Virginia affirmed in all respects. Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992).

STATEMENT OF FACTS

After her mother dropped her off at a skating rink in Chesterfield County on the night of October 5, 1990, Charity Powers, who was ten years old, disappeared in the early morning hours of October 6. Her body was recovered in a shallow grave on February 10, 1991, and petitioner was arrested two days later. Mueller then confessed to the capital murder, rape, and abduction of Powers.

A. Suppression Hearing

At the suppression hearing, the Commonwealth introduced evidence that Powers had last been seen after midnight on October 6, 1990 at a fast food restaurant located 1/4 of a mile from the skating rink. (App. 117-118).[1] Witnesses at the restaurant observed a man who resembled Mueller watching Charity as she sat outside the restaurant. (App. 120-121).

The Commonwealth's evidence also showed that Mueller, who was 42 years old, was no novice in the criminal justice system. He had been arrested three times on criminal charges in the 1970s; each time petitioner had been advised of his Miranda rights and, after signing a waiver form, had given a statement to the police. (App. 253-257, 269-275). Moreover, on October 9, 1990, Detectives Wayne Garber and G. F. Paul, III of the Chesterfield County Police Department each advised petitioner of his Miranda rights. Mueller then executed a waiver form and agreed to take a polygraph examination. Mueller indicated that he understood his rights and that he had a G.E.D. (App. 153, 184-185, 279-282). After Paul asked Mueller to sign a consent form for the search of his vehicle, however, Mueller stated that he wanted to talk with a lawyer before he took the polygraph examination and wanted to be present during the search of his car. (App. 188, 283). Mueller then stood up and

[1]References to the appendix in the direct appeal in the Supreme Court of Virginia will be designated as "App.___." Further, the facts relevant to the present petition are recited in the opinion of the Supreme Court of Virginia on direct appeal. Mueller v. Commonwealth, 244 Va. at 389-392, 422 S.E.2d at 383-385.

ended the examination. (App. 188).[2]

On October 22, 1990, petitioner again unequivocally ended an interview after stating that he wanted to leave and then standing up. (App. 190-191, 220). Subsequently, petitioner only mentioned an attorney once before his arrest. On November 5, 1990, Mueller stated that he would contact counsel to determine if the police "were setting him up." (App. 224). The police asked Mueller at least four times to obtain counsel and get back with them; Mueller said several times that he was attempting to retain one, but he never did and no lawyer ever called the police. (App. 193, 227-234).

Detective Garber and John Palfi, an FBI special agent, were the two primary investigators in the Powers case. They questioned Mueller more than a dozen times in the four months prior to his arrest. (App. 150-151, 191-192, 221-231). Mueller, who twice drove to the police department to be interviewed, was questioned in a variety of locations. (App. 184-185, 189-190, 219). As a result of their frequent contacts, the police developed a cordial relationship with Mueller. (App. 193). In fact, when the officers were late in calling on him, petitioner sometimes stated that he had been looking for them and had wondered where they were. (App. 194). At the end of some interviews, Mueller indicated that he wanted to speak with the police further. (App. 235).

The police recovered Charity's body on February 10, 1991, at

[2]Later, on February 7, 1991, petitioner unambiguously refused to take a polygraph test. (App. 237).

a site about 900 feet behind Mueller's home and less than a mile from the skating rink and fast food restaurant. (App. 1018, 1051-1056). Garber and Palfi subsequently arrested Mueller on the morning of February 12, 1991 and took him to the Chesterfield County Police Department where they interrogated him for approximately 4-1/2 hours. (App. 149-150). At the outset of the questioning, Garber again advised Mueller of his Miranda rights and he agreed to talk to him and Palfi. (App. 151-153, 195-196, 1345-1346). Neither officer noticed any physical or mental condition indicating that Mueller was not in full control of his faculties. (App. 198-240). The police provided Mueller with water and cigarettes and never refused him anything that he requested. (App. 198).

During the first two hours of the interrogation, Mueller several times stated that he was ready to go to jail or that the police should take him to jail or put him in jail. (App. 157-158, 170, 180-181, 212-213, 217-218). At no point prior to confessing, though, did Mueller say that he wished to end the questioning. If he had, that "would have been the end" of the interrogation. (App. 157). When the officers asked petitioner if he no longer wanted to talk to them, Mueller said he did not want to speak with anyone else but did wish to talk to them. (App. 158, 180-182).

Neither officer construed his comments to mean that petitioner wished to stop the interrogation. Rather, especially in view of the fact that at the beginning of the interview petitioner had discussed where and under what circumstances he was going to jail,

the officers viewed these comments as an attempt to avoid confessing, which they believed he was about to do. (App. 157, 181, 213). Each officer had previously interrogated other defendants who had similarly referred to going to jail and who had the same intent of forestalling a confession. (App. 171, 216).

After about two hours, Palfi left the room. Several minutes later, Mueller asked Garber whether he thought he needed an attorney. (App. 153-154). This was Mueller's sole reference to an attorney during the interrogation. (App. 199). At this point, Garber believed that Mueller wanted to give a statement but also wanted to ensure that an attorney did not have to be present when he gave it. (App. 155, 199-200). Thus, Garber did not construe petitioner's question as a request for counsel. (App. 209).

The officer responded to Mueller's question by shrugging his shoulders and stating: "We are talking." (App. 154, 179). While Garber did not recall shaking his head as he responded, he testified that if he had also done this his response was aimed at telling petitioner that he could not advise him on this matter, not that an attorney was unnecessary. (App. 155-156, 178-179, 200).

Several minutes after this exchange, Mueller told Garber to bring Palfi back into the room. He then shook each officer's hand, congratulated them for their job, and stated that they had the right man. (App. 201-202). This was the same kind of "unambiguous conduct" which the officers had seen when Mueller stopped the two interviews in October. (App. 202). It was, however, unlike petitioner's previous conduct during the post-arrest interrogation.

(App. 200-201, 241-242). Mueller then confessed to the abduction, rape, and murder of Charity Powers. (App. 202). Petitioner told the officers that he had talked because "it was eating at him. It was driving him crazy, and he had not been able to get any sleep." (App. 201, 244).

The trial court, in denying petitioner's motion to suppress his confession, found as fact that: petitioner knew how to ask for the assistance of counsel and had done so on October 9, 1990; Mueller was advised at the outset of the interview on February 12, 1991 of his Miranda rights and understood them; his ability to exercise his free will to invoke his rights was not thereafter overborne; petitioner's reference to an attorney in his question to Garber was not an expression of his desire for the assistance of counsel; and petitioner had been advised of and understood his Miranda rights before his arrest. (App. 71-75).

B. The Guilt Phase

The Commonwealth's evidence established that as a result of their ongoing investigation, the police began to search for Charity's body near Mueller's home in February, 1991. On February 8, searchers uncovered Charity's remains in a wooded area near Mueller's home. (App. 1017-1018, 1023-1027). The police then recovered a knife about 174 feet from Charity's grave as well as a hole about 120 feet from the burial site. (App. 1029-1033, 1048).

The prosecution also introduced Mueller's confession, in which he stated that he had offered Powers a ride home from the restaurant. Petitioner, however, then drove her to his home and

took her into the woods where he had intercourse with her. He admitted having had a knife nearby, but asserted that he had not used it. Because Mueller was concerned that Charity would turn him in, he said that he then strangled her to death. The next morning, petitioner tried to dig a grave in one place, and then buried Powers a few feet away near a pond.

The prosecution also adduced evidence that after confessing, Mueller helped the police to locate the clothing and personal effects of Charity which he had burned. Without Mueller's help, the police "would never have found" these items because the area was a dumping ground. (App. 1080). Mueller also showed them the location where he had lost his knife; it was in the same area where the knife had been found. (App. 1082). Petitioner also indicated that the place where the knife had been recovered was about 15 feet from where Mueller had intercourse with Powers. (App. 1083).

Finally, the Commonwealth introduced forensic evidence establishing the identity of the body as Charity. (App. 1097-1112). Concerning the cause of death, the medical examiner testified that "irregular holes in the area where each nipple would be" had been found and opined that these were injuries. (App. 1139, 1141). The medical examiner further testified that there was disproportionately greater decomposition in Charity's neck area, thus indicating that she had probably suffered a neck injury. (1146-1147). Finally, the examiner testified that the cause of death was "acute neck injury" and that Charity had bled before her death. (App. 1147-1153, 1160-1166).

C. The Penalty Phase

The Commonwealth introduced evidence detailing Mueller's long history of abductions and sexual assaults at knifepoint, including the rape of petitioner's own sister. (App. 1184-1221). Both parties also introduced expert testimony by clinical psychologists; each expert agreed that petitioner suffered from a "severe" or "pervasive life-long" anti-social personality disorder. (App. 1226-1229, 1273). Finally, testifying in his own behalf, petitioner acknowledged that he had not felt remorse after raping several women and conceded that after one victim had finished testifying in this case, he had called her "a lying bitch." (App. 1305-1307). Mueller also asserted that he had confessed to the capital murder charge only to help his girlfriend get off from a drunk driving charge. (App. 1323-1324).

REASONS FOR DENYING THE WRIT

I. Petitioner's Argument Attacking The Admissibility Of His Confession Raises Little More Than A State Law, Fact-Specific Claim And Thus Does Not Present A Substantial Federal Constitutional Question.

Petitioner challenges his confession, based on the failure of the police to cease questioning after he referred several times about being ready to go to jail and then asked Detective Garber if he needed an attorney. That is, Mueller asserts that he invoked his right to silence and the officers thereby committed a Miranda violation by continuing the interrogation. Further, petitioner contends that he would have requested counsel but for Garber's

reply and that the officer effectively undercut the Miranda warnings he had previously given.

Mueller's argument, though ultimately couched in constitutional terms, in large measure raises nothing more than a state law claim, resolution of which is merely dependent upon the facts in this case. That is, petitioner acknowledges the "bright line" test in Virginia, which requires a suspect to unambiguously invoke his right to counsel or right to remain silent, but says that Garber's response dissuaded Mueller from making such an unambiguous request. (Pet. at 14). The very fact that the present petition is almost entirely devoted to distinguishing other Virginia decisions illustrates its limited dimensions. (Pet. at 11-15).

It is settled that this Court does "not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). See also Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.). Likewise, this Court does not sit simply to review procedures of state courts or to review mere state law questions. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974); Pulley v. Harris, 465 U.S. 37 (1984). See also U.S. S. Ct. R. 10.1 (writ "will be granted only when there are special and important reasons therefor."); Rule 14.1(h) (petitioner must demonstrate that federal question "was timely and properly raised so as to give this Court jurisdiction to review the judgment.")

Petitioner's argument fails these threshold requirements. Adjudication of this issue is simply a function of applying

Virginia's "bright line" rule to the record in this case. This Court's resources should be directed to other, more substantial issues.

II. Petitioner's Argument Attacking His Confession Lacks Merit And Thus Does Not Advance A Substantial Federal Constitutional Question.

On the merits, Mueller's attack upon the admissibility of his confession is far too insubstantial to justify review by this Court. It is important to note that Mueller does not challenge the adequacy of his Miranda warnings at the outset of his interrogation or the validity of his Miranda waiver. Also, petitioner raises no Sixth Amendment right to counsel issue; his arguments arise solely under the Fifth Amendment.

Finally, petitioner does not challenge the factual findings of the trial court and the Supreme Court of Virginia. While the admissibility of a confession is ultimately a legal question, the subsidiary factual findings are presumptively correct in this Court. See Miller v. Fenton, 474 U.S. 104 (1985). See also Sumner v. Mata, 449 U.S. 539 (1981); Roemer v. Maryland Public Works Bd., 426 U.S. 736, 758 (1976). The trial court found that petitioner was familiar with his Miranda rights and had previously invoked them, was advised of and understood his rights at the start of the interrogation, did not mean by his question to Garber to seek the assistance of counsel, and did not have his ability to exercise his free will to invoke his rights overborne. (App. 71-75). The State Supreme Court on direct appeal also found that petitioner's

statements during his interrogation about going to jail "were simply impatient gestures [rather than] an invocation of his right" to remain silent, that he was aware of the consequences of talking to the police, that his question to Garber was not a request for counsel, and that "Garber did not ... respond to Mueller's question by answering 'No.' Rather, he replied, while shrugging and shaking his head slightly from side to side, 'You're just talking to us.'" 244 Va. at 395-396, 422 S.E.2d at 386-387. Accordingly, the State Supreme Court held that petitioner never invoked his right to remain silent or right to counsel and that Garber's response to Mueller did not vitiate his earlier Miranda waiver. 244 Va. at 396-397, 422 S.E.2d at 387.

The record in this case reflects the correctness of these rulings. During the first two hours of petitioner's interrogation, he said several times that he was ready to go to jail. Mueller, however, had already been arrested and brought up the conditions of his pending incarceration several times (for example, whether he would be placed in a segregated cell). Significantly, about 75 minutes into the interview, Palfi asked if Mueller would be more comfortable talking with other officers. Petitioner responded that he did not mind talking to him and Garber. "I've been talking to you for four months. I've established a pretty good relationship with you guys." Cf. People v. Thompson, 50 Cal.3d 134, 266 Cal.Rptr. 309, 325 (1990). At no point after his references to being put in jail did petitioner stand up or in some other way clearly manifest his desire to end the questioning. This sharply

contrasted with his termination of two prior interviews in October, 1990 and refusal to take a polygraph test on February 7, 1991. (App. 188-191, 220, 237). See Smith v. Illinois, 469 U.S. 91, 98 (1984) (events prior to statement may render it ambiguous).

Moreover, numerous other courts have upheld confessions after the suspect had made comments much like Mueller's. See e.g., Delap v. Dugger, 890 F.2d 285, 292-293 (11th Cir. 1989), cert. denied, 110 S. Ct. 2628 (1990) (defendant asked several times how much longer he would be detained and stated "that he wanted to go"); United States v. D'Antoni, 856 F.2d 975, 980-981 (7th Cir. 1988) (defendant told police that he had provided all of the information he had); Moore v. Dugger, 856 F.2d 129, 134 (11th Cir. 1988) ("When will you all let me go home?"); Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987), cert. denied, 488 U.S. 934 (1988) (defendant asked whether he had to continue with interrogation); United States v. Thierman, 678 F.2d 1331, 1335-1336 (9th Cir. 1982) ("Can we talk about it tomorrow?"). See also Fare v. Michael C., 442 U.S. 707, 724 (1979) (juvenile's request to speak with probation officer was not per se request to remain silent).

The record also establishes that petitioner did not invoke his right to counsel. First, petitioner effectively concedes that his question to Garber, standing alone, was insufficient to trigger his right to counsel. For example, Mueller repeatedly asserts that he was "contemplating" or "considering" a request for an attorney. (Pet. at 12-14). Further, he says that but for Garber's reply, he might have unambiguously sought counsel. Finally, Mueller states

that Garber could have remained silent when petitioner asked his question. (Pet. at 15). Beyond this, the state courts' unchallenged factual finding that Mueller's question was not a request for counsel necessarily resolves this issue. See also Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (Miranda does not require police "to ignore the tenor or sense of a defendant's response" to warnings); Norman v. Ducharme, 871 F.2d 1483, 1486 (9th Cir.), cert. denied, 110 S. Ct. 1483 (1989); United States v. Pelton, 835 F.2d 1067, 1072 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988).

Finally, petitioner's argument that Garber's response dissuaded him from clearly requesting counsel and vitiated the prior Miranda warnings is not well taken factually or legally. First, as the state courts found, Garber merely shrugged his shoulders and shook his head slightly from side to side, thus indicating that he could not answer Mueller's question. Because the officer did not give "an unambiguously negative reply," the Virginia Supreme Court rightly held that his response did not undercut the prior Miranda warnings. 244 Va. at 396, 422 S.E.2d at 387. See also Duckworth v. Eagan, 492 U.S. 195 (1989) (warnings in their totality satisfied Miranda; Court rejected petitioner's argument that phrase "if and when you go to court" misled him concerning the right to appointed counsel before questioning); California v. Prysock, 453 U.S. 355 (1981) (clarity of warnings conveyed to defendant his right to appointed counsel prior to questioning).

Further, Garber's fragmentary response could not possibly have confused Mueller as to the nature of his Miranda rights or the ramifications of making an inculpatory statement to the police. See generally Illinois v. Perkins, 110 S. Ct. 2394, 2397 (1990) (coercion determined from viewpoint of suspect). At the time of the confession, Mueller was 42 years old and had obtained a G.E.D. (App. 1281, 1287-1288). Petitioner had often been advised of his Miranda rights in connection with serious criminal charges and had either exercised or waived them. In the four months between Charity's disappearance and Mueller's arrest, the police informed him of his rights at least two times and he twice unambiguously stopped police interrogations. (App. 153, 184-185, 188-191, 253-257, 269-283).

At the outset of the post-arrest interrogation, Mueller was fully advised of his rights. Thereafter, prior to confessing, petitioner stated that he was concerned about being in jail, given the seriousness of the case. About 100 minutes into the interview, Palfi said in so many words: "Anything you tell us, we can get on the stand and tell the jury. You know that, or you should." Then, after Mueller confessed, he told the police that he had wanted "to get it off his chest." (App. 244).

It is therefore wholly untenable for Mueller to assert that Garber's statement misled him or caused him to confess. Given Mueller's background, his clear Miranda warnings at the start of his interrogation simply reinforced petitioner's understanding of his rights. See Colorado v. Spring, 479 U.S. 564, 577 (1987)

("broad and explicit" Miranda warnings conveyed to defendant nature of his "constitutional privilege and the consequences of abandoning it"). See also Patterson v. Illinois, 487 U.S. 285, 292-297 (1988) (defendant's Miranda warnings also served to apprise him of his Sixth Amendment right to counsel); Wyrick v. Fields, 459 U.S. 42, 47 (1982) ("circumstances [had not] changed so seriously" that defendant's waiver of counsel during polygraph test did not extend to post-test questioning). In sum, Mueller's knowledgeable background and explicit warnings at the start of the questioning overrode any arguable ambiguity in Garber's response. Cf. United States v. Cruz, 910 F.2d 1072, 1077-1079 (3rd Cir. 1990), cert. denied, 111 S. Ct. 709 (1991); United States v. Anglian, 784 F.2d 765, 768-769 (6th Cir.), cert. denied, 479 U.S. 841 (1986).

Finally, even if Garber's statement were deemed to contradict Mueller's Miranda warnings, the record in its entirety reflects that the statement did not induce his confession. See United States v. Pace, 898 F.2d 1218, 1246 (7th Cir.), cert. denied, 110 S. Ct. 3281 (1990) (even if police told defendant that his statements were "confidential" and that he was not a target of federal investigation, record established that such promises did not induce his statements). Cf. United States v. Bye, 919 F.2d 6 (2d Cir. 1990) (mere mention of possible benefits accruing from defendant's cooperation does not make statement involuntary).[3]

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[3]If the present petition is also deemed to argue that Mueller's confession was inadmissible under the Fifth Amendment's "totality of the circumstances" test, such a fact-specific claim is clearly an inadequate basis for this Court's review. Further, Mueller was a reasonably intelligent individual, who understood his rights and

III. Petitioner's Complaint Concerning The Adequacy Of The Voir Dire Does Not Raise A Substantial Federal Constitutional Issue.

Mueller complains that the voir dire was inadequate because he did not have the same latitude to ask whether anything would prohibit prospective jurors from giving a life sentence that the Commonwealth had in questioning veniremen whether anything would prohibit them from imposing the death penalty. Mueller further asserts that throughout the trial the judge and prosecutors asked leading questions which were "designed to box the jury in" and which did not effectively examine jurors concerning their fitness to serve in the penalty phase. (Pet. at 17).

First, the record establishes that petitioner may properly advance this argument only as to juror Max Zoeckler. The venire consisted of 47 persons. Twenty-three jurors were struck for cause. Petitioner objected to the trial court's qualification of ten of the remaining twenty-four veniremen. Mueller v. Commonwealth, 244 Va. at 399, 422 S.E.2d at 389. Petitioner challenged only two jurors, Ruby Moschler and Zoeckler, on the basis that they were "death prone." Id. Because the trial court did not refuse any question of Mueller's concerning Moschler's fitness to mete out a life sentence, the Supreme Court of Virginia found procedurally barred any attack upon the scope of her voir dire. 244 Va. at 399-400, 422 S.E.2d at 389. Thus, the adequacy

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had previously exhibited a willingness to exercise them. The officers observed no physical or mental impairment during petitioner's confession. (App. 240, 298). Thus, any such Fifth Amendment claim does not present a substantial federal constitutional question.

of the voir dire of Moschler or any other juror other than Zoeckler cannot warrant review by this Court. See Springfield v. Kibbe, 480 U.S. 257 (1987); Cardinale v. Louisiana, 394 U.S. 437 (1969). See also Coleman v. Thompson, 111 S. Ct. 2546 (1991).[4]

Petitioner's argument concerning the voir dire of Zoeckler breaks no new legal ground and hardly justifies this Court's review. Furthermore, his examination clearly comported with constitutional standards. First, the trial court made prefatory comments about the case and propounded questions about the jurors' possible bias or interest to groups of fourteen veniremen. (App. 383-416). See Rule 3A:14 of the Rules of the Supreme Court of Virginia. Then, the trial court questioned Zoeckler and other jurors individually concerning the extent, if any, of their exposure to pretrial publicity, ability to follow the principles of proof beyond a reasonable doubt and presumption of innocence, and ability to consider imposing either death or life imprisonment in the penalty phase. (App. 518-522). Then, each side was permitted to ask follow-up questions.

During Zoeckler's examination, the trial court sustained objections to two questions propounded by defense counsel concerning his possible "death-proneness." See Mueller v. Commonwealth, 244 Va. at 400, 422 S.E.2d at 389. The trial court's rulings were proper because Mueller's questions did not provide an

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[4]Similarly, Mueller's failure to object to the trial court's ruling that juror Theresa Gryder was qualified to sit on the jury bars any attack in this Court on her inclusion. See Mueller v. Commonwealth, 244 Va. at 402 n.4, 422 S.E.2d at 390-391.

adequate context for determining Zoeckler's fitness to serve in the penalty phase. That is, because the questions referred only to the nature of the aggravating evidence, and not the mitigating evidence, Zoeckler was forced to answer these questions in a vacuum. Further, these questions were offered "against the backdrop of the worst possible scenario ...." Pruett v. Commonwealth, 232 Va. 266, 281, 351 S.E.2d 1, 10 (1986), cert. denied, 482 U.S. 931 (1987). See also James Briley v. Bair, 750 F.2d 1238, 1247 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985) ("[W]e attach little weight to [the juror's] attitude in an exaggerated hypothetical situation.").

Beyond this, the remainder of the voir dire amply explored Zoeckler's fitness to serve in the penalty phase. At the outset of his examination, the trial judge explained to him the nature of the bifurcated proceedings and the sentencing options of death and life imprisonment. (App. 519-520). Zoeckler twice said that he would "consider" life imprisonment if given this as a sentencing choice (App. 520-521). Then, during the prosecutor's examination Zoeckler answered affirmatively when asked whether he could consider both the death penalty and life imprisonment and whether he would not automatically vote to impose a death sentence upon a finding of guilt. (App. 523-524). After defense counsel questioned Zoeckler concerning his potential "death-proneness" in the penalty phase, the prosecutor concluded by asking him a series of questions aimed at determining his ability to weigh both sentencing options. (App. 537-540).

Consistent with Morgan v. Illinois, 112 S. Ct. 2222 (1992), the Supreme Court of Virginia correctly upheld the adequacy of this voir dire. 244 Va. at 400-402, 422 S.E.2d at 389-390. In Morgan, this Court held that the state trial court denied the defendant due process in a capital murder trial by refusing to ask prospective jurors whether they would "'automatically' vote to impose the death penalty no matter what the facts" were. 112 S. Ct. at 2226. This Court concluded that this question had been necessary in order to reasonably determine whether the jurors could fairly carry out their duty to consider both the aggravating and mitigating evidence in the penalty phase of the trial. Because the voir dire did not make it clear that the jury was impartial, this Court reversed Morgan's conviction. 112 S. Ct. at 2235.

No such doubt exists in the present case. Zoeckler, like the other veniremen, was specifically questioned at length concerning his ability to consider both sentencing options if the case reached the sentencing stage. Particularly considering this Court's reaffirmation in Morgan that the Constitution "does not dictate a catechism for voir dire" and that due process requires only those questions which are not just helpful but necessary to the fairness of a trial, 112 S. Ct. at 2230, the voir dire in the case at bar passed constitutional muster. See also Mu'Min v. Virginia, 111 S. Ct. 1899 (1991).

CONCLUSION

For the foregoing reasons, certiorari should not be granted in

this case. Petitioner raises little more than state law arguments; the scope of any constitutional argument is extremely narrow. Moreover, petitioner points to no issue the disposition of which would materially aid other courts. Likewise, Mueller has not demonstrated that the trial court's rulings were incorrect. Thus, he has not shown any substantial federal constitutional question on any of the issues he advances. Accordingly, respondent prays that this Court deny the petition for certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 1993, a copy of this Brief in Opposition To Petition For a Writ of Certiorari was mailed to Everett Lee Mueller, No. 190275, Mecklenburg Correctional Center, P. O. Box 500, Boydton, Virginia 23917, petitioner pro se.

Robert H. Anderson III
Robert H. Anderson, III
Assistant Attorney General

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March 8, 1993

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SUPREME COURT, U.S.

The Honorable William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Everett Lee Mueller v. Commonwealth of Virginia
No. 92-7507

Dear Mr. Suter:

Enclosed please find a Brief In Opposition To Petition For A Writ Of Certiorari to be filed on behalf of respondent in the above-styled matter.

Thank you very much for your assistance in this matter.

Sincerely,

Robert H. Anderson III
Robert H. Anderson, III
Assistant Attorney General

7:11\360

SUPREME COURT OF THE UNITED STATES

EVERETT LEE MUELLER *v.* VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 92–7507. Decided April 19, 1993

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE SOUTER join, dissenting.

Under *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981), a defendant who invokes the Fifth Amendment right to counsel during custodial interrogation may not be subjected to further interrogation until counsel is made available to him, unless he subsequently initiates communications. "[I]t is inconsistent with *Miranda* and its progeny," the Court concluded, "for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.*, at 485. While easily stated, the *Edwards* rule has not always been easy to apply. In particular, the question of how officials conducting an interrogation ought to respond to a defendant's ambiguous or equivocal assertion of the right to counsel has divided the state and federal courts. The Court should take this opportunity to resolve this important constitutional question.

Virginia police arrested petitioner in connection with the abduction, rape, and murder of 10-year-old Charity Powers. Petitioner was advised of his *Miranda* rights and agreed to talk to a detective and an FBI agent. During the interrogation, petitioner asked the detective: "'Do you think I need an attorney here?'" The detective responded by shaking his head slightly from side to side, shrugging, and stating: "'You're just talking to us.'" The interrogation continued and petitioner confessed to the crimes. See 244 Va. 386, 391, 422 S. E. 2d 380, 384 (1992). Petitioner

sought to suppress the confession, claiming, *inter alia*, that the continuation of the interrogation constituted an *Edwards* violation. The trial court denied the motion and petitioner was tried, convicted, and sentenced to death. Relying on its prior decision in *Eaton* v. *Commonwealth*, 240 Va. 236, 253–254, 397 S. E. 2d 385, 395–396 (1990), cert. denied, 502 U. S. ___ (1991), which in turn relied on *Edwards*' reference to a defendant who has "clearly asserted" the right to counsel, see *supra*, at 1, the Virginia Supreme Court affirmed, concluding that petitioner's question "did not constitute an unambiguous request for counsel" and therefore was insufficient to trigger *Edwards*. 244 Va., at 396, 422 S. E. 2d, at 387. Petitioner now seeks review of this ruling, among others. Pet. for Cert. 11–12.

It has been nearly a decade since the Court acknowledged the existence of three "conflicting standards" used by state and federal courts for determining the consequences of ambiguous or equivocal assertions of the right to counsel. *Smith* v. *Illinois*, 469 U. S. 91, 95–96, and n. 3 (1984) *(per curiam)*. Thus,

> "[s]ome courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. . . . Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. . . . Still others have adopted a third approach, holding that when an accused makes an equivocal statement that 'arguably' can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel." *Id.*, at 96, n. 3 (citations omitted).

This disagreement has not abated. Although a number of Circuits have since adopted what *Smith* described as the "third approach," see *United States* v. *Porter*, 776 F. 2d 370 (CA1 1985); *United States* v. *Gotay*, 844 F. 2d 971, 975 (CA2 1988); *United States* v. *Fouche*, 776 F. 2d 1398, 1405 (CA9 1985); *Towne* v. *Dugger*, 899 F. 2d 1104 (CA11), cert. denied, 498 U. S. 991–992 (1990), the Sixth Circuit apparently adheres to the first approach. See *Maglio* v. *Jago*, 580 F. 2d 202, 205 (CA6 1978) (ambiguous invocation requires cessation of all questioning). State high courts also continue to issue conflicting decisions. Kentucky and Texas, like Virginia, now employ a variant of the second, "threshold standard," approach, see *Dean* v. *Commonwealth*, 844 S. W. 2d 417, 420 (Ky. 1992) (endorsing *Eaton* v. *Commonwealth*, *supra*); *Russell* v. *State*, 727 S. W. 2d 573, 575 (Tex. Crim. App.) (en banc) (right to counsel invoked if "clearly asserted"), cert. denied, 484 U. S. 856 (1987), while other States have embraced the third approach. See *State* v. *Staatz*, 159 Ariz. 411, 414, 768 P. 2d 143, 146 (1988); *People* v. *Benjamin*, 732 P. 2d 1167, 1171 (Colo. 1987), *Crawford* v. *State*, 580 A. 2d 571, 576–577 (Del. 1990); *Ruffin* v. *United States*, 524 A. 2d 685 (D. C. 1987), cert. denied, 486 U. S. 1057 (1988); *Hall* v. *State*, 255 Ga. 267, 273, 336 S. E. 2d 812, 815 (1985); *State* v. *Robinson*, 427 N. W. 2d 217, 223 (Minn. 1988).

As it is apparent that a substantial number of criminal defendants who are identically situated in the eyes of the Constitution have received and will continue to receive dissimilar treatment because of the different approaches taken by the lower courts, I would grant certiorari.